

MINUTE OF RECORD

COURT OF THE UNITED STATES

IN THE DISTRICT COURT OF THE UNITED STATES

No. 1001 50-1 216

THE TRANSPORT COMPANY OF WEST VIRGINIA
DEFENDANT

VS.
JAMES HENRY

IN SENATE TO THE UNITED STATES SENATE
IN SENATE TO THE UNITED STATES SENATE

(23,104)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1028.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,
PETITIONER,

vs.

FRANK IMBROVEK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA, }
DISTRICT OF MARYLAND, } To-wit:

At a District Court of the United States in and for the Maryland District, begun and held at the City of Baltimore on the first Tuesday in June, (being the sixth day of the same month), in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Thomas J. Morris, Judge Maryland District; John C. Rose, Judge Maryland District; John Philip Hill, Esq., Attorney; George W. Padgett, Esq., Marshal; Arthur L. Spamer, Clerk.

Among others were the following proceedings, to-wit:

Frank Imbrovek	} In Admiralty.
vs.	
The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirek, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, a body corporate.	

LIBEL.

(2) Filed November 22, 1910.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

Frank Imbrovek	} In Admiralty.
vs.	
The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirek, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, a body corporate.	

To the Honorables Thomas J. Morris and John C. Rose, Judges of the United States District Court for the District of Maryland:

(3) The libel and complaint of Frank Imbrovek against the Hamburg-American Steam Packet Company, a foreign cor-

poration, incorporated under the laws of the Kingdom of Germany; Captain H. Meyerdirek, Master of the S. S. "Pretoria," a non-resident of the District of Maryland, and the Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland, in a cause of damages, civil and maritime, alleges as follows:

First. That at the time of the happening of the wrongs and injuries hereinafter complained of the said Hamburg-American Steam Packet Company was and still is the owner of the S. S. "Pretoria," and that Captain H. Meyerdirek was and still is the Master of the said S. S. "Pretoria." The said S. S. "Pretoria" is not now within the jurisdiction of this Honorable Court.

Second. That heretofore, to-wit, on the 22nd day of August, 1910, the said S. S. "Pretoria" was lying in the Port of Baltimore, at the dock of the Atlantic Transport Company in said port, for the purpose of loading her cargo at the said port.

Third. That Frank Imbrovek, the libellant, had been regularly employed by the respondent, the Lorant Stevedore Company, as a stevedore to assist in loading the said steamship at the said Atlantic Transport Company's pier; that he was one of the several stevedores working on said date in assisting to load said steamship's cargo.

(4) Fourth. That on or about August 22nd, 1910, at about 10 o'clock at night, Frank Imbrovek, the libellant, in the regular course of his duties and employed as such stevedore, was in the hold of said vessel assisting in the loading of its cargo, consisting of copper ingots, said cargo being put into the hold of said steamship as follows:

That on the main deck of said steamship, a short distance in front of the fore hatch, were two masts, to which were attached, near their respective bases, booms, which could be lowered or raised so as to place any load being lifted or lowered thereby over the side of the steamship or into the hatch.

That these booms were equipped with cables or ropes, blocks and necessary tackle used in raising or lowering loads to or from the vessel; that the tackle from these booms were shackled together, one boom being placed over the side of the vessel to raise the load from the scow alongside of said steamship, and the other boom being placed directly over the fore hatch of said steamship.

That the copper ingots would be placed in a net sling and raised to a height above the side of the vessel; the cable on that

boom would be slackened, and the cable on the boom over the hatchway would then be taken in and the net sling would in this manner be carried over the hatch opening, the two booms remaining stationary; the net sling would then be lowered through the hatch into the hold of the vessel, where the libellant, Frank Imbrovek, with other stevedores employed with him, would unhook the said net sling and carry the copper ingots from it and store them in the hold of said steamship, and (5) as these net slings were unloaded they would be attached to the tackle and raised out of the hold of the vessel through the hatch and over the side and lowered into the scow to be filled and returned to the hold of the steamship.

Fifth. That at the time the cargo was being received they were working through the center section of the forward hatchway, on the lowest or bottom deck of the steamship, the fore section and aft section of this hatch having been left in place, which allowed an opening of about eight feet through which to raise and lower the tackle and sling.

Sixth. That just before the accident alleged a net sling, loaded with copper ingots, had been lowered into the hold of the vessel and had been unhooked from the tackle and the empty sling had been attached thereto; that a deckman standing on the upper deck gave a signal to the engineer operating the tackle to hoist; that the machinery was started, and the net sling on its way up from the hold of said steamship caught on the middle fore and aft socket of the cross beam of the aft section of the hatch and raised said hatch out of its supports, from which it dropped into the hold of the vessel, a distance of, approximately eighteen or twenty feet, upon the libellant, Frank Imbrovek, and other employees of the Lorant Stevedore Company working in said hold, before the said libellant had an opportunity or chance to get away from under said falling section of the hatch, and while the said Frank Imbrovek, the libellant, was working in the usual, necessary and ordinary location and manner and was exercising due care and caution and was not guilty of any negligence contributing to said accident, and that the said accident was due to the negligence and carelessness of the respondents and their agents in the following particulars:

A. In the failure of the respondents to bolt the hatches left in position during the loading of said steamship—for which provision was made in the construction of the said (6) hatches—to the coamings of the hatchway; that the beams in the construction of the hatches have holes correspond-

ing with holes in the sockets in the coamings, through which bolts were intended to be placed, and thus securing the hatches; and that the hatch which fell was not bolted, as alleged.

B. In failing to provide a sufficient opening through the hatchway, through which the net sling was lowered and raised.

C. In negligently using the two derricks aforesaid with tackle shackled together while hoisting or lowering the said net slings through the limited and insufficient opening in the hatchway.

D. In negligently adjusting the position and setting of the boom of the derrick over the hatchway, thereby causing the net sling and tackle to pass too close to the cross beams of said aft section of the forward hatch.

E. In negligently raising the tackle and empty sling from the hold of the vessel at a very rapid rate of speed.

Seventh. Your libellant says that in consequence of the falling of said aft section of the forward hatch upon him, he received serious and permanent injuries—that is, a fractured and depressed skull, right arm and leg permanently paralyzed, and that he is now, and is permanently, wholly disabled and incapacitated, physically and mentally, as a direct result of said injuries.

Eighth. Your libellant says that it was necessary for him (7) to go into the hold of said vessel and come under the opening in said hatchway, and that he had no warning whatever that said opening was insufficient and, that said aft section of the hatch was, therefore, in a defective and dangerous condition, nor could he have known of the dangerous and unsafe condition of said hatchway by the exercise of ordinary care on his part, but that the respondents, the said Hamburg-American Steam Packet Company, Captain H. Meyerdirek, and the Lorant Stevedore Company, well knew, or could have known of the insufficient space in said hatchway of the unsafe and dangerous condition of said hatches, and of the improper placing of the boom over the hatchway, as alleged.

Ninth. Your libellant says that the respondents failed to provide a reasonably safe and proper place in which your libellant was to work as such stevedore, and by the negligence and carelessness of said respondents the said libellant was exposed to risk and hazard which his employment did not contemplate, and of which he had no warning, and that the said accident was not the result of negligence or want of care on the part of the said libellant, Frank Imbrovek, directly thereunto

contributing, but was the result of the negligence to the said respondents, as hereinbefore alleged. And for the purpose of recovering damages for said injuries, this libellant brings this suit and claims damages to the extent of twenty-five thousand dollars (\$25,000.00).

Tenth. Your libellant is very poor, and, because of his poverty, is totally unable to pay the costs of this suit or to give security therefor, and he further avers that he believes he is entitled to the redress he seeks in this suit.

Eleventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

(8) Wherefore, your libellant prays for an order that he may be allowed to sue in *forma pauperis*, and that process of monition may issue to the Marshal of the District aforesaid, commanding him to summon the Hamburg-American Steam Packet Company, Captain H. Meyerdirek, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, and that each of them may be required to appear before this Honorable Court and answer, under oath, this libel and all and singular the matters aforesaid, and that if the said Hamburg-American Steam Packet Company and Captain H. Meyerdirek, Master of the S. S. "Pretoria," cannot be found, their goods and chattels, and particularly the S. S. "Patricia," which is owned by the said Hamburg-American Steam Packet Company, and which is now within this district, be attached to the amount sued for and costs; and if sufficient goods and chattels cannot be found, then that their credits and effects be attached, or that the credits and effects of either of them be attached, in the hands of the Atlantic Transport Company, or in such other bodies' corporate or persons' hands that same may be found, to the amount sued for and costs; and that they may be required to answer all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of damages sustained by your libellant, together with costs; and that he may have such other and further relief as in law and justice he may be entitled to receive.

SEMMES, BOWEN & SEMMES,
Proctors for Libellant.

his
FRANK X IMBROVEK.
mark

Tests as to mark of Frank Imbrovek,
C. EDW. SCHAUMLOEFFEL.

UNITED STATES OF AMERICA, }
District of Maryland. }

(9) Frank Imbrovek, being duly sworn, made oath before me, the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore City, this 21st day of November, 1910, that the allegations in the foregoing libel are true, and the libellant is entitled to the redress sought by this suit, to the best of his belief, and that, owing to his poverty, he is not able to bear the expenses of this suit or to give the bond and security required, and he further makes oath that the Hamburg-American Steam Packet Company is a foreign corporation, and that Captain H. Meyerdirek is not a citizen of the United States, nor does he reside within the District of Maryland, and that neither of these respondents has an office within the District of Maryland to the best of his knowledge, and that unless the said respondent, the said Hamburg-American Steam Packet Company's property which is now within the district be attached, he is apprehensive that he will be without redress.

Witness my hand.

C. EDW. SCHAUMLOEFFEL,

Justice of the Peace.

(10) On the foregoing libel and prayer thereof, it is ordered by the District Court of the United States for the District of Maryland this 22nd day of November, 1910:

That the libellant be allowed to sue in *forma pauperis*;

That the officers of this court shall issue and serve all processes and perform all duties in said cause without the libellant being required to prepay the fees for same or give security therefor, and

That the libellant shall have the same remedies as are provided by law in other cases, and

That the warrant of attachment prayed for in the foregoing libel be issued against the goods and chattels, credits and effects of said respondents, as prayed.

THOS. J. MORRIS,

District Judge.

SUMMONS WITH CLAUSE OF FOREIGN ATTACHMENT.

(11) Issued November 22, 1910.

THE UNITED STATES OF AMERICA }
District of Maryland, } to-wit:

The President of the United States of America to the Marshal
for the Maryland District—Greeting:

We command you that you summon the Hamburg-American Steam Packet Company, a foreign corporation, Captain H. Meyerdirck, Master of the Steamship "Pretoria" and the Lorant Stevedore Company, a corporation, if they be found in your district, and if they or either of them, can not be so found, that you attach their goods and chattels, and particularly the Steamship "Patricia," which is owned by the said Hamburg-American Steam Packet Company, and which is now within this District, to the amount sued for in the libel hereinafter referred to and costs, and if sufficient goods and chattels cannot be found, then attach their credits and effects or the credits and effects of either of them in the hands of the Atlantic Transport Company or in such other bodies' corporate or persons' hands the same may be found to the amount sued for and cost as aforesaid, to appear before the Judge of the District Court of the United States for the District of Maryland, at the United States Court Room, in the City of Baltimore, on the 8th day of December, next, to answer unto the libel and complaint of Frank Imbrovek in a cause of damages, and how you shall execute this precept you make known to us in our District Court, for the District aforesaid, and have you then and there this writ.

Witness the Honorable Thomas J. Morris, judge of our District Court, this 22nd day of November, in the year of our Lord, one thousand nine hundred and ten.

Issued 22nd day of November, 1910.

[Seal of Court]

ARTHUR L. SPAMER, Clerk.

MARSHAL'S RETURN ATTACHED TO ABOVE SUMMONS.

(12) "The Hamburg-American Steam Packet Company and Captain H. Meyerdirck, Master of the Steamship "Pretoria" not found, summoned the Lorant Stevedore Company, by service on James C. Gorman, its manager, and copy summons with clause of foreign attachment left with him, summoned the Atlantic Transport Company, by service on James C. Gorman,

its manager, and attached the credits belonging to the Hamburg-American Packet Company, and copy summons with clause of foreign attachment left with him, attached the Steamship "Patricia" and posted copy summons with clause of foreign attachment, November 22, 1910, vessel released on stipulation, November 26, 1910.

GEORGE W. PADGETT,
U. S. Marshal."

**PETITION OF LIBELLANT TO AMEND LIBEL AND
ORDER OF COURT THEREON GRANTING HIM
LEAVE TO AMEND SAME.**

(13) Filed January 17, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frank Imbrovek

vs.

The Hamburg-American Steam Packet Company, a foreign corporation; Captain H. Meyerdirck, Master of the Steamship "Pretoria," and The Lorant Stevedore Company, a body corporate,	}	In Admiralty.
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To the Honorable the Judges of said Court:

The petition of Frank Imbrovek, libellant in the above entitled case, respectfully represents unto your Honors:

1. That he filed his libel in the above entitled cause against the Hamburg-American Steam Packet Company, a foreign corporation, Captain H. Meyerdirck, Master of the steamship "Pretoria," a non-resident of the said district, and the Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland;

That at the time of filing said libel your libellant was informed and believed that The Lorant Stevedore Company was a corporation incorporated under the laws of the State of Maryland; that he is now informed and believes that there is no such corporation as The Lorant Stevedore Company, but that it is an adjunct or department of The Atlantic Transport Company, a corporation duly incorporated under the laws of the State of West Virginia, and that while employed by the Steve-

dore Company, he was in fact employed at the time of the wrongs and injuries complained of in said libel by the Atlantic (14) Transport Company aforesaid;

2. Wherefore your libellant prays leave to amend his libel by making The Atlantic Transport Company, a body corporate, duly incorporated under the laws of the State of West Virginia, a party defendant, and he also prays that process of motion may issue to the Marshal of the District aforesaid, commanding him to summon the said The Atlantic Transport Company, a body corporate, and that it may be required to appear before this Honorable Court and answer the libel and amended libel filed herein, and that the said libel may be amended in the following particulars:

a. To amend the opening paragraph of said libel by inserting in the place and stead of "The Lorant Stevedore Company, a body corporate, duly incorporated, under the laws of the State of Maryland," the following: "the Atlantic Transport Company, a body corporate, duly incorporated under the laws of the State of West Virginia;

b. To amend paragraph 3, page 1, by substituting in the place and stead of "The Lorant Stevedore Company"—the following: "The Atlantic Transport Company, through its stevedoring department";

c. To amend paragraph 6, page 3, line 18, by substituting in the place and stead of "The Lorant Stevedore Company"—"The Atlantic Transport Company";

d. To amend paragraph 8, page 5, line 8, by substituting in the place and stead of "The Lorant Stevedore Company" the name of "The Atlantic Transport Company";

e. To amend the prayer for process, page 6, line 6 by substituting in the place and stead of "The Lorant Stevedore Company"—"The Atlantic Transport Company";

And your petitioners will ever pray.

(15)

SEMMES, BOWEN & SEMMES,

Proctors for Petitioner.

Leave granted as prayed this 17th day of January, A. D., 1911.

JOHN C. ROSE,

District Judge.

SUMMONS.

(16) Filed January 17, 1911.

THE UNITED STATES OF AMERICA)
 District of Maryland, } to-wit:

The President of the United States of America to the Marshal
 for the Maryland District—Greeting:

We command you that you summon The Atlantic Transport Company, a body corporate, if it be found in your district, to appear before the Judge of the District Court of the United States of America for the District of Maryland, at the United States Court Room in the City of Baltimore, on the 2nd day of February next to answer unto the libel and complaint of Frank Imbrovek in a cause of damages and how you shall execute this precept you make known to us in our District Court for the District aforesaid, and have you then and there this writ.

Witness the Honorable John C. Rose, Judge of our said District Court, this 17th day of January in the year of our Lord one thousand nine hundred and eleven.

Issued 17th day of January, 1911.

[Seal of Court] ARTHUR L. SPAMER, Clerk.

**MARSHAL'S RETURN ENDORSED ON ABOVE
 SUMMONS.**

"Summoned The Atlantic Transport Company, by service on James C. Gorman, its manager, and copy summons left with him, January 19, 1911.

GEORGE W. PADGETT,
 U. S. Marshal."

APPEARANCE FOR RESPONDENT.

(17) Filed February 3, 1911.

IN THE COURT OF THE UNITED STATES FOR THE DISTRICT OF
 MARYLAND.

Frank Imbrovek

vs.

Hamburg-American Steam Packet Co.,	}	No.	Dkt.
Captain H. Meyerdirek and The At-			
lantic Transport Co.			

Mr. Clerk:

Enter my appearance as proctor for the Atlantic Transport Co., in the above entitled case.

RALPH ROBINSON.

**ANSWER OF THE ATLANTIC TRANSPORT COMPANY OF
WEST VIRGINIA.**

(18) Filed February 17, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frank Imbrovek vs. The Hamburg-American Steam Packet Company, a foreign corporation; Cap- tain H. Meyerdirek, Master of the S. S. "Pretoria," and Atlantic Transport Company of West Virginia, a body cor- porate.	}	In Admiralty.
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To the Honorable Thomas J. Morris and John C. Rose, Judges
of the United States District Court for the District of
Maryland:

The separate answer of the Atlantic Transport Company
of West Virginia to the libel and complaint of Frank Imbrovek
against it and others in a cause of damages, civil and maritime,
alleges and propounds:

1. Answering the first paragraph of the said libel this re-
spondent says, that inasmuch as the allegations therein set out
are not in any way connected with this defense, but concern
the liability of certain co-defendants, this respondent neither
admits nor denies the same, but leaves the said co-defendants
to make such answer as they or either of them may see fit.

2. Answering the second, third and fourth paragraphs of
the said libel, this respondent alleges:

That on the date and at the time mentioned in the said
(19) libel, the said libellant was not in the employ of this
respondent, but this proponent alleges and propounds, upon
knowledge, information and belief that the said libellant was
in the employ of the Lorant Stevedore Company and was en-
gaged with other employees in loading copper ingots into the
steamship "Pretoria" in the Port of Baltimore, substantially
in the manner in said paragraph set out.

And further answering said second, third and fourth par-
agraphs of the said libel, this respondent alleges that it did not
have the requisite corporate power to engage in the business of
stevedoring for vessels other than those owned by it, at the

time mentioned in the libel as the date of the accident therein mentioned and described, nor has it such corporate power now, nor has it ever had, or lawfully exercised such corporate power.

3. Answering to fifth paragraph, this respondent admits from information, knowledge and belief that the copper ingots were being loaded upon the bottom deck of the said vessel through the centre section of the forward hatchway, but denies that the said opening through which the tackle and sling were raised and lowered was about eight feet, and alleges that the said opening was nine feet two inches in width by sixteen feet in length, and was amply sufficient for the work when prosecuted skilfully and carefully by the said libellant and his co-employees.

4. Answering the sixth paragraph of the said libel this respondent admits that the libellant was injured by the falling of the hatch coverings of the aft section of the hatch in the manner therein alleged, but denies that the same was due to its negligence or to that of any of its agents for which it could (20) or ought to be held liable in this cause; and particularly denies:

(A) That it was the duty of this respondent or of its agents to have the said hatches, or any of them, bolted.

(B) That it failed to provide a sufficient opening through the said hatchway for the raising and lowering of the sling.

(C) That it was negligent in using the two derricks aforesaid with tackle shackled together as described in paragraph 4 of the said libel.

(D) That it was negligent in adjusting the position and setting of the boom of the derrick over the hatchway and that the setting of the said derrick caused the said sling and tackle to pass too close to the cross beams of the said aft section of the forward hatch.

(E) That it is responsible for the injury to the libellant, for the manner in which the said empty sling and tackle was raised from the said hold.

And further answering said sixth paragraph this respondent alleges and propounds, upon information, knowledge and belief:

That the raising and lowering of the said tackle and net was under the exclusive operation and control of the co-employees of the said libellant, under the following circumstances, all of which were unreservedly within the knowledge and information of the libellant at the time of his entering, and continuing upon the work in which he was engaged when he sustained the injured alleged in the libel;

There were located just forward of the hatchway two winches worked by steam, one on the port side and one on the starboard side of the vessel, each operated by co-employees of the libellant, attached to each winch and a part thereof was a drum, upon which was wound a wire tackle; that the wire tackle on the drum of the winch on the port side was rigged to a boom, by which the copper was lifted over the side of the vessel, and the wire tackle on the starboardside was rigged to a (21) boom by which the copper was lowered into the hold, after it had been lifted over the side and by which also the empty net was raised therefrom; that on the deck and along-side of the open hatchway through which the copper was being loaded was stationed another co-employee of the libellant, whose duty it was to give the signal to the co-employee operating the starboard winch, as to when to start and stop his engine for the purpose of lowering the tackle and net into the hold and raising it therefrom; that as soon as the net loaded with copper was lowered into the hold, it was detached from the tackle by another co-employee and fellow-servant of the libellant, working in the gang with him in the hold of the vessel, and an empty net was thereupon attached to the tackle, whereupon the signalman on deck gave the signal to the fellow-servant of the libellant in charge of the starboard winch to haul up.

5. Answering the 7th paragraph of the libel, this respondent says:

That it has no accurate information of the exact character and extent of the injuries sustained by the libellant.

6. Answering the 8th paragraph of the said libel, this respondent alleges upon information, knowledge and belief that the said libellant was hired as a stevedore by the Lorant Stevedore Company to engage in loading copper ingots into the hold of the steamship "Pretoria," under the circumstances set out in this answer; that he had long been engaged in the employment of stevedore and was familiar with the work of loading copper ingots, and was fully cognizant of and familiar with the hazards and dangers of said employment; and this respondent denies that said libellant had no warning that said

hatchway opening was insufficient, if the same was insufficient, which this respondent denies, and this respondent denies that the said aft section of the hold was in a defective and dangerous condition and avers that if same was in a defective, dangerous (22) or unsafe condition, and that said defective, dangerous or unsafe condition was unknown to this respondent, and could not have been ascertained by the exercise of reasonable care and diligence on its part; and this respondent denies that the boom was improperly placed over the hatchway.

And further answering the said paragraph this respondent alleges upon knowledge, information and belief that if said hatchway was in defective, dangerous or unsafe condition, or if the hatchway opening was insufficient, or if the boom was improperly placed over the said opening, these were all facts well within the knowledge and information of the libellant, or could have been readily ascertained by him by the exercise of due care and caution on his part, and having gone to work in the hold of the said vessel, knowing of the defective condition of these appliances or any of them, he thereby assumed the risk of accident because of their said defective and dangerous condition.

7. Answering the ninth paragraph of the said libel, this respondent denies that it failed to provide a reasonably safe and proper place for the libellant to work as stevedore, or that he was exposed to any risk or hazards not contemplated by his employment, and of which he had no warning; and denies that said accident was the result of negligence or want of care on its part.

8. That all and singular the premises are true;

Wherefore this respondent prays that this Honorable Court would be pleased to pronounce against the libel aforesaid and to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

THE ATLANTIC TRANSPORT COMPANY
(23) OF WEST VIRGINIA,

By P. A. S. FRANKLIN, President.
RALPH ROBINSON,
Proctor for Respondent.

Attest:

J. J. McGLONE, Secretary.

STATE OF NEW YORK, }
 City of New York, } to-wit:

Before me, the subscriber, a notary public of the State of New York in and for the City of New York, duly commissioned and qualified, personally appeared this 16th day of February, 1911, P. A. S. Franklin, the president of the Atlantic Transport Company of West Virginia, and made oath in due form of law that the matters and facts set out in the foregoing answer are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

F. W. RIDGWAY,
Notary Public.
 Notary Public, Kings County,
 Certificate filed in New York County.

[Notary's Seal]

**ANSWER OF THE HAMBURG-AMERICAN STEAM
 PACKET COMPANY.**

(24) Filed June 2, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
 DISTRICT OF MARYLAND.

Frank Imbrovek <i>vs.</i> The Hamburg-American Steam Packet Company, a foreign corporation; Cap- tain H. Meyerdirek, Master of the S. S. "Pretoria," and Atlantic Transport Company of West Virginia, a body cor- porate.	}	In Admiralty.
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To the Honorable Thomas J. Morris and John C. Rose, Judges
 of the United States District Court for the District of
 Maryland:

The separate answer of the Hamburg-Amerikanische
 Packet Fahrt Actien Gesellschaft, herein sued as the Hamburg-
 American Steam Packet Company, to the libel and complaint
 of Frank Imbrovek, against it and others in a cause of dam-
 ages, civil and maritime, alleges and propounds:

1. Answering the first paragraph of the said libel, this
 respondent says, that it was and still is the owner of the Steam-

ship "Pretoria," mentioned therein as the property of the Hamburg-American Steam Packet Company, and that Captain H. Meyerdirck was and still is the master of said steamship "Pretoria," and that said Steamship "Pretoria" is not now and was not at the time the libel in this cause of action was filed and attachment thereon issued, within the jurisdiction of this Honorable Court.

(25) 2. Answering the second paragraph of the said libel, this respondent admits the facts therein stated.

3. Answering the second, third and four paragraphs of said libel, this respondent admits upon knowledge, information and belief the matters and facts therein stated to be substantially true, as therein recited.

4. Answering the fifth paragraph this respondent admits from information, knowledge and belief that the copper ingots were being loaded upon the bottom deck of the said vessel through the centre section of the forward hatchway, but denies that the said opening through which the tackle and sling were raised and lowered was about eight feet, and alleges that the said opening was nine feet two inches in width by sixteen feet in length, and was amply sufficient for the work when prosecuted skillfully and carefully by the said libellant and his co-employees.

5. Answering the sixth paragraph of the said libel, this respondent admits that the libellant was injured by the falling of the hatch coverings of the aft section of the hatch in the manner therein alleged, but denies that the same was due to its negligence or to that of any of its agents for which it could or ought to be held liable in this cause; and particularly denies;

(A) That it was the duty of this respondent or of its agents to have the said hatches, or any of them, bolted.

(B) That it failed to provide a sufficient opening through the said hatchway for the raising and lowering of the sling.

(C) That it was negligent in using the two derricks aforesaid with tackle shackled together as described in paragraph 4 of the said libel.

(26) (D) That it was negligent in adjusting the position and setting of the boom of the derrick over the hatchway and

that the setting of the said derrick caused the said sling and tackle to pass too close to the cross beams of the said aft section of the forward hatch.

(E) That it is responsible for the injury to the libellant for the manner in which the said empty sling and tackle was raised from the said hold.

And further answering said sixth paragraph this respondent alleges and propounds, upon information, knowledge and belief:

That the raising and lowering of the said tackle and net was under the exclusive operation and control of the co-employee of the said libellant, under the following circumstances, all of which were unreservedly within the knowledge and information of the libellant at the time of his entering, and continuing upon, the work in which he was engaged when he sustained the injuries alleged in the libel.

There were located just forward of the hatchway two winches worked by steam, one on the port side, and one on the starboard side of the vessel, each operated by co-employees of the libellant. Attached to each winch and a part thereof was a drum, upon which was wound a wire tackle; that the wire tackle on the drum of the winch on the port side was rigged to a boom, by which the copper was lifted over the side of the vessel, and the wire tackle on the starboard side was rigged to a boom by which the copper was lowered into the hold, after it had been lifted over the side and by which also the empty net was raised therefrom; that on the deck and alongside of the open hatchway through which the copper was being loaded was stationed another co-employee of the libellant, whose duty it was to give the signal to the co-employee operating the starboard winch, as to when to start and stop his engine for the purpose of lowering the tackle and net into the hold and raising it therefrom; that as soon as the net loaded with copper was lowered into the hold, it was detached from the tackle by another co-employee and fellow servant of the libellant, working in the gang with him in the hold of the vessel, and an empty net was thereupon attached to the tackle, whereupon the signalman on deck gave the signal to the fellow servant of the libellant in charge of the starboard to haul up.

5. Answering the 7th paragraph of the libel, this respondent says:

That it has no accurate information of the exact character and extent of the injuries sustained by the libellant.

6. Answering the 8th paragraph of the said libel, this respondent alleges upon information, knowledge and belief that the said libellant was hired as a stevedore by the Atlantic Transport Company to engage in loading copper ingots into the hold of the steamship "Pretoria", under the circumstances set out in this answer; that he had long been engaged in the employment of stevedore and was familiar with the work of loading copper ingots, and was fully cognizant of and familiar with the hazards and dangers of said employment; and this respondent denies that said libellant had no warning that said hatchway opening was insufficient, if the same was insufficient, which this respondent denies, and this respondent denies that the said aft section of the hold was in a defective and dangerous condition, and avers that if same was in a defective, or dangerous, or unsafe condition that said defective, dangerous or unsafe condition was unknown to this respondent, and could not have been ascertained by the exercise of reasonable care and diligence on its part; and this respondent denies that the boom was improperly placed over the hatchway.

And further answering the said paragraph this respondent alleges upon knowledge, information and belief that if said hatchway was in a defective, dangerous or unsafe condition, or if (28) the hatchway opening was insufficient, or if the boom was improperly placed over the said opening, these were all facts well within the knowledge and information of the libellant, or could have been readily ascertained by him by the exercise of due care and caution on his part, and having gone to work in the hold of the said vessel, knowing of the defective condition of these appliances or any of them he thereby assumed the risk of accident because of their said defective and dangerous condition.

7. Answering the ninth paragraph of the said libel, this respondent denies that it failed to provide a reasonably safe and proper place for the libellant to work as stevedore, or that he was exposed to any risks or hazards not contemplated by his employment, and of which he had no warning; and denies that said accident was the result of negligence or want of care on its part.

8. And this respondent further alleges and propounds, that upon the arrival of its said Steamship "Pretoria" in the harbor of Baltimore, it turned over the same to the Atlantic Transport Company, independent contractors, engaged in the business of stevedoring, for the purpose of unloading such cargo as remained in the said Steamship "Pretoria" (part of which had been discharged at the Port of Boston) and of loading

such part of her cargo as was to be received in the City of Baltimore, and that the said libellant was not in the employ of this respondent at the time of the happening of the matters and facts alleged to have occurred on the 22nd day of August, 1910, or at any other time.

9. And that all and singular the premises are true.

Wherefore this respondent prays that this Honorable Court may be pleased to pronounce against the libel aforesaid and to discharge the bond filed in this cause to secure the release of the Steamship "Patricia," and to condemn the libellant in (29) costs, and otherwise right and justice to administer in the premises.

EMIL BOAS,

Resident Director & General Manager.

RALPH ROBINSON,

Proctor for respondent.

STATE OF NEW YORK, }
City of New York, } to-wit:

I hereby certify that on this 1st day of June in the year nineteen hundred and eleven, before me, the subscriber, a notary public of the State of New York in and for the City of New York aforesaid, duly commissioned and qualified, personally appeared Emil L. Boas, and made oath in due form of law that he is the Resident Director and General Manager for the Hamburg-Amerikanische Packet-fahrt Gesellschaft, and that the matters and facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

F. C. WACKEROW,

[Notarial Seal]

Notary Public,

Notary Public,

New York County, No. 190,

Registerer No. 2216.

TESTIMONY ON BEHALF OF LIBELLANTS.

(30)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF MARYLAND.

May 19, 1911.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek, in
her individual capacity, and as mother
and next friend of Joseph, John, Mary,
Eva, Stanislaus, Frank and Antonie,
infant children of Martin Szczesek,

v.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdirk, master of the S. S.
Pretoria,

and

Atlantic Transport Company of West Vir-
ginia, a body corporate,

and

Frank Imbrovek

v.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdirk, master of the S. S.
Pretoria,

and

Atlantic Transport Company of West Vir-
ginia, a body corporate.

(31) The above entitled cause came on to be heard before
his Honor Judge John C. Rose at 10 o'clock a. m., May 19,
1911.

Present in behalf of the plaintiff, Messrs. SEMMES,
BOWEN & SEMMES.

Present on behalf of the defendant, Messrs. BOND, ROBIN-
SON & DUFFY.

Papers in the case were read to the court.

Thereupon—

Dr. WALTER D. WISE, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

Q. What is your name? A. Walter D. Wise.

Q. You are a practicing physician in the City of Baltimore? A. Yes.

(32) Q. For how long have you practiced? A. I graduated in 1906.

Q. From what university? A. The College of Physicians and Surgeons.

Q. Are you connected with any hospital now? A. I am connected with the Mercy Hospital.

Q. For how long a period have you been so connected? A. I was an intern there for two years and I have been connected with it since that time, practically since I was graduated.

Q. That is practically five years? A. Yes.

Q. Do you remember attending a man by the name of Frank Imbrokek at the Mercy Hospital? A. Yes.

Q. Do you remember about when that was? A. That was in August, I think, of 1910; I do not remember the exact date.

(33) Q. You did not operate on him yourself, did you? A. No, Dr. Haines, who is now in Clarksburg, West Virginia, operated on him but it was done under my supervision; I was standing by and I has just finished operating on the other case. There were three or four of them brought in at the same time and Dr. Haines prepared this case and then went ahead with it and I stood by. I had charge of it.

Q. What was the condition of the man when he was brought in? A. He had what we call a compound fracture of the skull; that is, the skull was factured and all of the overlying tissues were lacerated. The skull bone was depressed, the fractured portion, down into the brain to quite an unusual degree. The membranes covering the brain were lacerated and the brain substance was lacerated.

Q. What was done for him? A. The wound was cleansed in the usual way, the fragmented portions of the brain were removed and the general debris removed; the small portions of (34) the bone and the exuding brain substance were removed,

and we kept in quite a large piece of bone, a triangular shaped piece, to prevent the hole from being any larger than necessary, and that grew all right.

Q. What was this exuding brain matter that you just spoke about? A. The brain, of course, is only a semi-solid substance and the skull is full, or approximately full, of brains and cerebral fluid, and a piece of the bone being driven down into the brain substance, of course, some of it had to exude.

Q. Describe the size of that piece of bone that you referred to just now, the triangular piece that you left in? A. I should say it was triangular in shape, each leg of the triangle being about two inches long, or two and a half inches.

Q. What was the size of the fracture? A. Including the triangle within a circle, I should say about three inches in diameter.

Q. Have you seen this man recently? A. I saw him this morning.

(35) Q. In what condition is his head now? A. He has a rather large bony defect in the skull. The overlying tissues are collapsed and the scalp is retracted down into the depression.

Q. Do you know anything about his general physical condition? A. After the operation, after the injury, he had a complete paralysis of the opposite side.

Q. Which side was this injury to the head on? A. He was injured on the left side of the head.

Q. And the paralysis would, therefore, be on the right side? A. Yes, the paralysis was on the right side.

Q. He had a complete paralysis of the right side? A. Yes, the arm and leg were both completely paralyzed for I do not know how long, but for sometime, and that gradually improved and now he has a partial paralysis of the right arm and a little less paralysis of the right leg.

CROSS EXAMINATION.

By Mr. ROBINSON:

(36) Q. That partial paralysis which you speak of now in the right arm and right leg, will that, in your opinion, continue to get better? A. That is a very hard question to answer and it is entirely problematical. I would not like to give an opinion on that.

The COURT: In other words, it may happen or may not and you cannot tell whether it will or will not?

The WITNESS: Yes.

Q. Does the fact that he has improved to such an extent at the present time convey to you any idea as to his gradually getting better, and does it not mean that the trouble is wearing off? A. Yes, that would look that way, but the man seems to be about in the condition that he was in when I saw him about six months ago. He improved apparently up to a certain point and then stopped. Whether time will cure him completely is beyond me to say.

(37) Q. How often have you seen him since August 10th? A. I saw him every day as long as he was in the hospital. I do not know just how long that was, but several months I think, then he came to the office I do not know how often, but probably every week or ten days for a considerable period of time. I do not think I have seen him until this morning within the last four or five months.

Q. Do I understand you to tell the court that within this last four or five months there has been no perceptible improvement? A. That is my opinion.

Q. There has been no perceptible improvement in him in the last four or five months? A. His general condition is better, he is fatter and he looks in better condition, but so far as his arm is concerned I cannot see any improvement.

Q. In the arm or leg there is no improvement so far as the paralysis is concerned? A. That is it.

Q. And yet you would not like to give it as your opinion (38) that it will not disappear? A. I would not like to give that as an opinion.

The COURT: Is it now sufficient, in your judgment, to incapacitate him for hard manual labor?

The WITNESS: It appears to be.

The COURT: Are you able in those cases always to tell how much the incapacity is absolutely and how much of it is due to the man's own idea that he cannot do this or that?

The WITNESS: It is hard to tell.

The COURT: Sometimes it gets better after the damage case is over?

The WITNESS: Yes.

RE-DIRECT EXAMINATION.

By Mr. BOWEN:

Q. About this injury to the head, can you state whether or not that will improve? A. Do you have reference to the bony defect?

Q. Yes, you say there is a hollow there, is there any (39) chance of that filling up? A. The hollow might fill up from pressure inside of the bone.

The COURT: But the bone will not grow again to any great extent?

The WITNESS: No, sir, it will run off around the edges and fill in to that extent, but it will not fill in entirely.

Q. (By Mr. BOWEN) You say you were operating on another man, who was he, do you remember? A. I do not remember his name, it was an odd name.

The COURT: Did he die?

The WITNESS: Yes, a short time afterward.

Mr. SEMMES: What was his condition?

The WITNESS: He had the whole front part of his head knocked in over a tremendous area.

Mr. SEMMES: He was wounded in the head too?

The WITNESS: Yes.

Mr. SEMMES: What day was that?

The WITNESS: That was the night of this other operation, (40) some time in August, in the middle of the night or late at night.

Q. (By Mr. BOWEN) Would you recognize the name of that man if you heard it? A. No.

The COURT: He was brought in with the other man?

The WITNESS: Yes.

Mr. ROBINSON: There is no dispute about that, we will admit that the other man was killed.

RE-CROSS EXAMINATION.

By Mr. ROBINSON:

Q. This libel says that he has a fractured and depressed skull; do you mean to say that when he had a large bony defect that that is what you mean by a depressed skull? A. No.

The COURT: You mean that a part of the skull is gone, when you say a defect?

The WITNESS: By a depressed skull we mean a piece of bone that is mashed down, and by a defect we mean a piece (41) of bone that is gone.

Q. (By Mr. ROBINSON) This man has not got a depressed skull now, has he? A. No, sir.

Q. Did you examine him mentally? A. I did not do that. He spoke no English at the time and I think what little English he speaks now he learned in the hospital. I do not think he spoke any English, or at least very little.

Q. (By Mr. SEMMES) You spoke of that bone being a growth, what made that piece of bone there; you spoke of a triangular piece of bone, was that a growth or was it the result of the accident? A. That was the result of the accident.

Mr. SEMMES: My brother said there was a growth there.

Mr. ROBINSON: I said a large bony defect.

The COURT: Suppose, for example, this were a can and you mashed it in and some of the pieces you would take out and suppose there is a triangular piece that you raised up and (42) left there; there is still left an opening over which there is no bony covering and the skin and other covering tissues of that kind are depressed; the bone is gone and in that place the tissues are depressed?

The WITNESS: Yes, the triangle I speak of is like a peninsula jutting out into a body of water.

The COURT: It is like that any hollow substance that has been mashed irregularly.

(Witness sketches on piece of paper and passes to court.)

The COURT: By "defect" you mean that the bone is gone?

The WITNESS: Yes.

(Testimony of witness concluded.)

Thereupon—

FREDERICK LENTZ, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

(44) Q. What is your name? A. Frederick Lentz.

Q. Where do you live? A. 1313 North Dallas street.

Q. What is your occupation? A. At the present time I am tallyman, tally keeper.

Q. What was your occupation around August 22, 1910?
A. Tally keeper.

Q. For whom? A. The Atlantic Transport Company.

Q. Are you still working for them? A. No, sir.

Q. When did you leave their employ? A. The 13 or the 14th of February, I think it was; either one of those dates, the 14th I think it was.

Q. Sometime in the middle of February? A. Yes.

Q. Do you remember an accident that occurred to a man (45) by the name of Imbrovek and another one by the name of Szczesek? A. Yes.

Q. Do you remember when that accident took place? A. It took place in August some time.

Q. Do you remember the date, what day of the week was it? A. It was the 21st of the month.

Q. Do you remember what day? A. No, sir, I cannot recall the day.

Q. What time of day was it? A. It was at night.

Q. Do you remember about what time? A. It was between nine and ten o'clock or between half-past nine and ten o'clock, I should say, somewhere along there.

Q. At night? A. Yes.

Q. Where were you working at that particular time? A. I was stationed in the hold as watchman to keep the stevedores (46) from tampering with the copper; they always put a watchman down there and I was stationed down there to watch this copper.

Q. Down in the hold of the vessel? A. Yes, the lower hold.

Q. What part of the hold, fore or aft? A. As a rule we have to get all over the hatch, to watch both sides and keep on the alert from one side to the other.

The COURT: Which hatch was being opened then?

The WITNESS: No. 4 hatch this was.

The COURT: They number them from the bow of the vessel, do they?

Mr. BOWEN: They number them the other way, as I understand it, your Honor.

The WITNESS: No. 4 was in the forward part of the ship, it was before the bridge.

Q. (By Mr. BOWEN) Were you at this No. 4 hatch when (47) the accident occurred? A. Yes.

Q. I want you to describe to his Honor this No. 4 hatch; do you know the dimensions of that hatch? A. Do you mean the size of the hatch?

Q. Yes. A. No, I could not give you that exactly but I could come within three or four feet of it.

Q. Do so. A. Do you mean the whole hatch?

Q. Yes; how many hatch covering has this big hatch? A. Do you mean in the lower hold or the whole business?

Q. They have the same number all the way up, on each deck, have they not? A. I suppose they have, but I did not count the hatches.

The COURT: Put it in this way: How many sections were there in No. 4 hatch?

The WITNESS: Three sections, a middle section, a forward (48) section and an after section, and I suppose each section will cover about four hatches on each side, making eight hatches to the section.

The COURT: Each section had four separate coverings?

The WITNESS: Yes, on the starboard and port side.

Q. (By Mr. BOWEN) Do you know the size of each one of those sections? A. I judge the width is about eight feet, as close as I could get to it.

The COURT: Do you gentlemen propose to put in these dimensions accurately?

Mr. DUFFY: We have a plat here.

The COURT: I do not want to waste time by approximating these measurements if accurate figures are to be given later.

Q. How many decks has that ship? A. I think you would call it four decks.

Q. At the time of this accident, describe which hatches (49) were on and which hatches were off? A. The after section in the lower orlop deck, that is the first deck below the lower hold, they were all on.

Q. All the way up? A. I could not explain all the way up because I did not notice, but I noticed the beams and the fore-and-afters and the hatches were on in the first deck, which we called the lower orlop deck, and the after part and the forward part, I remember the beam being in and all the hatches were not on, there were only some few on then.

Q. Sections you mean?

The COURT: No, hatch covers, he means.

The WITNESS: Yes, hatch covers.

Q. How about the hatch covers over the hold of the vessel, the fore hatch cover? A. The beams were in there and a few hatches were on; I think there were two off on each side to let us get up through the ladder way.

The COURT: On what deck of the ship were these men when they were struck?

The WITNESS: In the lower hold in the after part, sir, (50) right under the after section.

The COURT: Then there was something open all the way down?

The WITNESS: The middle section, yes, was open all the way down.

(Blue print shown to the court.)

Q. Do you remember on the top deck, that is on the main deck, which hatch covers were on and which were off? A. I could not tell that because that was on deck, that was away on deck, and I do know that the after beam was in, but so far as the hatches are concerned I do not know which ones were on.

The COURT: You mean the hatch covers when you say hatches, do you not?

The WITNESS: Yes, we call them hatches, I mean hatch covers.

Q. How many men were working down there in the hold of the vessel? A. Ten men are supposed to be in the hold (51) but one of them was out at the time and him I met going down the ladder as I was going up.

Q. Imbrovek was there, was he not? A. Yes.

Q. You know him do you? A. I know him, yes.

Q. And this man Szczesek was there too, was he not? A. Yes, I know him also.

Q. Just describe to his Honor what you saw with regard to this accident? A. In regard to the accident, the off-shore side, the starboard side, the men had a sling load and they had emptied it and they took the sling and were removing it for the next sling load and in the meantime another one came down and was loaded on the in-shore side.

The COURT: That was the port side?

The WITNESS: Yes, that was the port side; these men took the copper out of the net to carry it into position where (52) it belonged, and after they unhooked that they hooked the empty net on.

Q. Who did that? A. One of the men, I cannot recall his name. And of course he hollered to go ahead and gave the signal to go ahead. In the meantime they did not go ahead just that moment, and shortly after that someone gave the signal to go ahead, I suppose the man on deck, and as they did the net came out and went on up and hooked under this lower cross-beam.

The COURT: On the main deck or the deck below?

The WITNESS: On the deck below, the deck above the lower hold. It hooked on to the cross-beam and down came the whole business.

The COURT: Did it hook on to the first cover above where the men were standing?

The WITNESS: Yes, the first cover above where the men were standing, that is the same as this ceiling above them, and down came the whole business.

Q. How high is that ceiling? A. That could have been, (53) I suppose, a little over twenty feet, or something like that as near as I can judge it.

Q. You say it hooked on this beam and the whole thing came down, what do you mean by that? A. The cross-beam, the middle fore-and-after and the side fore-and-after on the hatches came down.

Q. The hatches themselves? A. The hatch covers.

Q. Was there more than one hatch cover that came down?
A. Yes, more than one hatch cover came down I am sure.

The COURT: Practically the whole section came down, did it not?

The WITNESS: That whole section came down.

The COURT: Or at least all of it that was on; do you remember whether it was all covered at the time?

The WITNESS: They were all covered and all came down; I cannot just recall how long they are.

The COURT: But they were all covered?

(54) The WITNESS: Yes.

The COURT: And the effect of the thing was to bring all the hatch covers and beams down, the accident brought the whole thing down?

The WITNESS: After the beam went up, of course, the beams fell that way and down came the whole business. (Indicating.)

The COURT: If the beam came out then it could not help coming down?

The WITNESS: If the beam came down everything had to follow it, of course.

Q. You said more than one hatch cover came down? A. Yes.

Q. Where did they come from? A. There were in the neighborhood of four on each side, just as I stated before.

Q. Were they piled on top of each other? A. No, sir.

The COURT: If you pull out the cross-beam that whole section comes down?

(55) The WITNESS: Some few of those were piled on top; some few of the middle section were put on there.

Q. Is that what you mean by saying several hatch covers?

A. Some of the center hatches were put on top of the original ones.

Q. And that all came down? A. That whole business, yes.

The COURT: Something like a dozen pieces, including the covers?

The WITNESS: Yes, something like that. And then, after that, I ran over to the men and assisted them as much as possible, and after I saw that some of the men were not hurt and could assist those that were hurt, I ran up to the superintendent and told him of the case and asked that they order an ambulance down there because I knew some of the men were severely hurt. So I went back again and the men had gotten stretchers and removed the men who could not come out of the hold (56) without assistance, and I helped to bandage them and helped as best I could.

Q. You say that you helped carry these men out? A. No, I did not help carry them out of the hold but I helped them on the ladder. Then we put them on the stretcher and put them on the scow. By that time the mate and the captain came down and they brought some absorbent cotton and I helped to bandage them up after putting them on the scow. With the two last ones I went to the hospital.

Q. Was or was not this the first time that this particular gang worked in that No. 4 hatch? A. You mean from the time the ship arrived?

Q. Yes. A. I could not recall that; I do not know whether they worked the night previous to that in the same hatch or not, because when we are stationed we go out during the night and report for work and they assign us to any hatch that they see fit. I may work in No. 4 on that night and the following night in No. 7, and so on; we are consigned to no particular hatch.

(57) Q. I believe you said at the time of this accident that you were under this No. 4 hatch? A. Yes.

Q. At just what part? A. I was standing right in the middle section, underneath the port-side combings. I was standing about two feet inside the combings as we call it.

Q. The combing of what? A. The hatch combing.

The COURT: It so happened that you were standing in a safe place?

The WITNESS: Yes, sir, as soon as I saw the thing hook I saw the thing coming up and as it did I ran to the wing as fast as I possibly could hollering, "Look out below," but it was done so quick that it was too late.

Q. These other men were caught but you got out of the way? A. Yes, they were caught.

Q. Describe how this ceiling came down through the hatch, through the opening made by the hatch cover being off. A. (58) Do you mean by the sling-load of copper coming in?

Q. Yes, all the circumstances. A. At times it came down pretty straight and then at times it came down with a sort of swingy motion. At times it hit the side of the cross-beam but on the way down it could never happen, you see, because if it hit the beams coming down it could not happen.

Q. What I am trying to get at is this: Did that sling of copper go down in the centre of that opening or toward the aft-section or the far-section? A. At times, if the net did not swing, it would come down steady, but if it did swing a little it would be bound to hit the side of these beams.

Q. Are you familiar with the construction of those hatches? A. Above the orlop deck?

Q. Yes. A. No, sir.

Q. Did you see the hatch covers after they fell? A. (59) After I went out of the hold?

Q. Yes. A. No, sir, I did not go back any more because I went right on the ladder and by that time they were bringing one of the men out and it seemed like the balance of them could not look at it and of course I picked out one for myself and tried to assist him as best I could. It seemed like the others could not do anything for them.

Q. Do you know whether or not there is any provision made for bolting those hatches down? A. As a rule I suppose they have them bolted; they have bolt holes in them.

Q. That is not an exact answer to my question; do you know whether there is a provision made in the covers or in the beams for bolting those hatches down? A. I do not understand you.

The COURT: As a rule, can you bolt the hatches down, is there a way of doing it?

The WITNESS: Yes, in the side of the combing there are pieces extending out and holes through them and holes through the cross-beams so they can be bolted.

(60) Q. Were those beams bolted at this time? A. Hardly; if they had been bolted the beam would not have come out; it could not have come out if it had been bolted.

Q. Did these slings and cables come down in the same position the whole time you were there,—do you understand what I mean? A. No, sir.

The COURT: Would the boom always, as it came down, go precisely in the same position over the hatch or would there be a variance of a foot or two?

Mr. ROBINSON: The boom is a stationary one, your Honor.

Q. Where is the location of the boom and was it changed at any time while you were working there?

(Objected to; argument.)

Q. Before this accident, was the location of the boom over the hatch changed? A. That happened on deck, I could not answer that.

Q. You could not tell the location of the sling? A. No, (61) sir, it may come down in the after part or come down in the forward part, I could not tell.

The COURT: In the actual doing of the work, sometimes the net would come down or the sling would come down a little closer to the forward part and at times a little closer to the after part, is that it?

The WITNESS: If it is in a swinging position it is liable to hit one side or the other.

Q. You say that you were employed by the Atlantic Transport Company? A. I was at the time of the accident, yes.

Q. And you were employed as watchman to watch these men? A. I was stationed in the hold to keep the men from tampering with the copper.

Q. By whom were those men employed, do you know? A. Which men?

Q. Imbrovek and Szczesek, these stevedores. A. I suppose the Atlantic Transport Company employed Imbrovek or Szczesek, or the Lorant Stevedore Company. I do not know (62) who they were employed by but I think it is the stevedoring company.

The COURT: Are they separate corporations, the Lorant Stevedore Company and the Atlantic Transport Company? I know the Sevedoring Company is a branch of the Atlantic Transport Company, but are they separate companies or not?

The WITNESS: I could not answer that.

Mr. SEMMES: They are not incorporated, so far as we have been able to discover.

The COURT: It has been testified in several cases that they are.

Q. (By Mr. SEMMES) The beam that you saw was caught as the sling went up, and were those beams across the ship or fore and aft? A. They were from starboard to port.

Q. Across the ship? A. Yes, athwartship beams, iron beams.

CROSS EXAMINATION.

By Mr. ROBINSON:

(NOTE: A question arose on the pleadings and discussion (63) followed, at the end of which discussion Mr. Robinson said: "We will admit that the Atlantic Transport Company was carrying on a stevedoring business and employed these two men, Imbrovek and Szczesek.")

Q. (By Mr. ROBINSON) I want to show you a diagram of this ship; this is the bow and this is the stern; you see the decks are laid off there and this is the top deck and these are the masts and this is the smokestack and there is the bridge up there and this is the forecastle and that is the next hatch and that is the next; this is the hatch here in which the men were hurt; it was down here in this room, as I understand it, that you were all loading copper? A. Yes, right down in there.

Q. These booms were rigged up on this mast in that fashion, one outboard and one inboard? A. Yes.

Q. And the copper was being let down through here, was it not? A. Yes.

Q. This is the hatch that the net caught and pulled off?
(64) A. Yes.

Q. Was it the ceiling of the hatch which you were in or the one next above it? A. It was this one here, the lower one.

The COURT: And it was the after part that pulled off?

The WITNESS: Yes.

Q. (By Mr. ROBINSON) As I understand it, this hatch here is divided into three compartments? A. Yes.

Q. And this forward compartment and that after compartment were left covered and this centre compartment was left open and it was down through that centre compartment that the copper was being loaded? A. Yes.

Q. The men were standing down here loading copper and this net was hooked on and when it came up it hooked on to this beam right here? A. Yes.

Q. And tripped it up and down it came? A. Yes.

(65) Q. Can you tell the court how large that net was? A. I judge it was about five feet square.

Q. It is a big thing and very heavy, is it not? A. It is in the neighborhood of five feet square or something along there.

Q. It is made out of heavy rope, is it not? A. It is made out of hempen tar rope.

Q. It is something like the pocket of a billiard table, isn't it made up in that fashion? A. Yes, when it is laid out it is just as flat as this paper.

Q. And it folds up? A. Yes, and it has ropes running through eyelets all through it.

The COURT: To keep it open?

The WITNESS: Yes, then there is a bridle and up on the net they have a sort of circle and all those ropes are run through these rings and of course they bring those two together, like that, and hook them on. (Demonstrating with paper.)

Q. How many pigs of copper can be loaded in that net?
(66) A. As a rule we handle ingot and pigs—

Q. What were you loading on this occasion? A. It was sort of mixed up, we had round pieces and ingot bars and long bars.

Q. Can you tell how many hundred weight of copper you can put in one of these slings? A. No, sir, I just cannot recall that because sometimes they put in a little bit and then

they put in the full capacity, and that is the way it works; it depends upon how fast they are going.

Q. How long had you been working down there in this room before this accident happened? A. I judge about five minutes past six I went down there and we turned right to at six o'clock that night.

Q. When did the accident happen? A. Between half-past nine and ten o'clock.

Q. And you relieved the day shift, I believe; had there been any other shift of stevedores working down there in the same compartment when you came there and went on duty; did another shift leave when you came on? A. I cannot just (67) remember that. At times when we are coming down the pier the gangs are coming off, they have knocked off, and I do not know whether they are coming from this ship or not.

Q. Do I understand you to tell his Honor that you did not know how these other hatch covers were arranged in those upper hatches that night? A. Yes, I did not pay much attention to that.

The COURT: You do not know whether they were on or off, do you?

The WITNESS: No, sir.

The COURT: But of course the middle section had to be off in all of them in order to load the copper?

The WITNESS: Yes, the middle section had to be off to get the sling-load down there.

(Testimony of witness concluded.)

Thereupon—

FRANK PIEHLER, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

(68) Q. What is your name? A. Frank Piehler.

Q. What is your business? A. Stevedoring.

Q. How long have you been at that business? A. Over twenty years.

Q. Are you working for any one or are you in business for yourself? A. I am not in business for myself.

Q. You have worked down in the holds of vessels, have you not? A. Yes.

Q. Can you state whether or not it is a dangerous place to put stevedores where the centre section covering of a hatch is removed on a steamship like the Pretoria with stevedores in the hold, with the fore and aft covers left on, to load copper ingot in a sling without bolting the hatches down?

(69) (Objected to; argument.)

Q. Do you know the Steamship Pretoria? A. I have seen her and that is about all; I have never been on board of her, not to my knowledge.

The COURT: I would suggest that you define these hatches to be about twenty-four feet, or in that neighborhood, fore and aft, each section about eight feet, with the middle section uncovered and the other two sections in their places, loading copper into the hold on a vessel by the use of a sling or not. I think that is in keeping with the testimony. Now is that accurate, Mr. Duffy?

Mr. DUFFY: I think the question is objectionable anyhow; I do not think you can offer expert testimony on a question of that kind.

The COURT: I rather think that expert testimony is unnecessary so far as that particular answer is concerned, for I am quite convinced that it is not the safest place to be under those circumstances. It does not do a great deal of harm to have that particular question asked, but I agree with you that (70) it is hardly a matter for expert testimony. The only place that expert opinion would come in at all would be in testifying if there is any way at all to make it less dangerous. It is dangerous, that may almost be said to be a concession, but the only question is can it be made less dangerous by the adoption of any precaution in view of the speed in which the ship has got to be unloaded and the way the operations have to be carried on. Now that is what you want expert testimony on, and not on the question of whether the thing is dangerous because the very event itself proves how dangerous it was.

Q. Is there any method of making the premises less dangerous to stevedores working in the hold of a vessel where the vessel is loading copper ingot in a net sling through a hatch

the centre section of which only is removed, leaving on the fore-section and the after-section, neither one of those sections of the hatches being bolted down; now in your opinion, is there any way of making that hatch more safe?

(Objected to; objection overruled; exception noted.)

A. There is no way to make it any safer unless you take (71) some of the sections off, either one or the other.

Q. Suppose they do not take those sections off, either one or the other, how can they make it more safe and secure?

The COURT: The real question he wants to ask is, would it be any safer if the sections were bolted?

Mr. DUFFY: And I must object to that question.

(Objection overruled; exception noted.)

A. Yes.

(Testimony of witness concluded.)

(At this juncture Interpreter Sigmund Stephans was sworn.)

Thereupon—

FRANK IMBROVEK, a witness of lawful age, produced in his own behalf, having been first duly sworn, was examined and testified as follows.

DIRECT EXAMINATION.

By Mr. BOWEN (through the Interpreter):

Q. What is your name? A. Frank Imbrovek.

(72) Q. How old are you? A. Forty-two years.

Q. Are you married, and if so, how many children have you? A. I am married and have seven children.

Q. Is your wife living? A. Yes.

Q. How old is she? A. Thirty-seven.

Q. How old are the children? A. The oldest is twenty, then eighteen, then sixteen, then thirteen, then eleven, then eight, six and three.

Q. Where do you live? A. 2631 Hudson street.

Q. Do all of your children live with you? A. Yes.

Q. You are the man who was hurt and who is suing in this case, are you not? A. Yes.

Q. Do you remember when you were hurt? A. When I was hurt I do not remember because I was almost killed.

(73) Q. Do you remember how long you were in the hospital? A. According to wife's testimony, it was about two months.

Q. Have you done any work since the accident? A. I have never done anything because I cannot do anything.

Q. How much money did you make when you worked for the Atlantic Transport Company? A. I made twelve dollars, fourteen dollars and sixteen dollars a week, depending upon the time. Some weeks it was slack, of course, and we did not have so much work.

Q. Have you made any money since the accident? A. I have not made a cent since I left the hospital.

Q. What kind of work were you accustomed to doing before this accident happened? A. I was loading copper and flour, all kinds of laboring work.

Q. How long had you been stevedore? A. About nine years.

Q. How long have you been in this country? A. About nineteen years.

(74) Q. Did not your work as a stevedore require the exertion of a good deal of strength?

Mr. ROBINSON: There is no use of going into that, that is admitted.

The COURT: Yes, I think it may be admitted that stevedoring requires as much physical labor as any employment in the world.

Q. Where were you working at the time this accident occurred and do you remember what hit you? A. I was in the hold.

The COURT: What ship?

The WITNESS: I do not remember the name of the ship.

Mr. ROBINSON: That is conceded, there is no doubt about that, it was the Pretoria.

The COURT: What were you doing at the time?

The WITNESS: Loading copper.

Q. Did you see the hatch fall? A. I did not see the fall.

Q. Did you hear anybody to holler to look out? A. When he hollered everything was on the bottom.

(75) (Cross examination waived.)

(Testimony of witness concluded.)

Thereupon—

STANISLAUS JAKUBCZAK, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN (without the Interpreter):

Q. What is your name? A. Stanislaus Jakubczak.

Q. Where do you live? A. 1925 Fleet street, or Canton Avenue.

Q. What business are you in? A. I am a laborer, I work at stevedoring.

Q. Did you work in the same gang with Frank Imbrovek and Martin Szczesek on August 22, 1910, when they were hurt? A. We worked together; they were leaders.

Q. What hatch was it that was pulled off and that dropped down on these men? A. The middle of the steamer, close to the pipe.

Q. I mean hatch covering, was it the hatch covering right (76) over where you were working? A. I have a drawing right here. (Producing memorandum book from pocket.)

The COURT: Did you make that drawing yourself?

The WITNESS: Yes.

(Drawing shown to court.)

Q. Was it the fore or the aft section that fell? A. This section. (Indicating on drawing.) I worked here at the lower hold; these are the decks, four in all. This is the section that fell. There was a little ladder to go down stairs right there.

Q. How many coverings were on that hatch? A. The whole business, hatches and everything, dropped down. The cross-beams and everything fell down.

Q. Was it the hatch right over where you were working? A. There was everything above that fell down; there are eight

hatches and eight of them dropped down. Eight hatches and the fore-and-afters all came down.

Q. Do you know if the fore and aft sections of that hatch (77) were on at the time of the accident? A. There are four on each section.

Q. Was the fore section on at the time of this accident? A. There are not four sections, there are only two across to the beam.

The COURT: He evidently does not understand.

Q. Was the fore section on, the middle section off and the after section on?

Mr. ROBINSON: He does not understand.

A. Yes, that is plain and simple. There is the top deck and there is the lower deck. That is open and that stays.

Q. One section on? A. Yes, and middle section off.

Q. Do you know how wide that middle section is? A. About ten feet, I took the measurement with a string.

Q. Did you measure the string? A. I measured when the steamer made a second trip.

Q. Did you know how long the string was? A. About ten feet; I measured the string.

(78) Q. By ten feet you mean the width; is that athwartship or fore and aft? A. I measured the middle fore-and-after and then I measured the other ones and they were the same distance.

CROSS EXAMINATION.

By Mr. ROBINSON:

Q. You mean it is ten feet from here to here? (Indicating in memorandum book of witness the distance of the hatch fore and aft.) A. That is the middle place and that is the side place and I was measuring this way; I was measuring fore and aft.

Q. And that is ten feet? A. Yes.

Q. How long is it across here? (Indicating athwartships.) A. About twice as much.

The COURT: The whole hatch?

Mr. ROBINSON: No, sir, he means the part that was open.

Q. How far is it from here to here, the whole hatch? (79) A. About thirty feet, measuring fore and aft.

(Testimony of witness concluded.)

Thereupon—

Dr. ALEXIS MCGLANNAN, a witness of lawful age, having been produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

Q. What is your name? A. Alexis McGlannan.

Q. Where do you live? A. 114 W. Franklin street, Baltimore, Md.

Q. You are a practicing physician in the City of Baltimore, are you not? A. Yes.

Q. And how long have you been practicing? A. Fifteen years.

Q. Are you connected with any institution at this time? A. Yes, I am associate surgeon at the Mercy Hospital and the (79a) St. Agnes Hospital.

Q. Have you examined Frank Imbrovek? A. Yes.

Q. When? A. This morning.

Q. What did you find his condition to be? A. We found a defect in the skull on the left side over the motor region of the brain covered by a scar.

Q. (By the COURT) By a "defect in the skull" you mean an absence of skull or bone, the bone having been removed? A. Yes, sir; we found a loss of power in the right arm and right leg with an increase in the reflex action of the right leg.

Q. What does the increase in the reflex action mean? A. It indicates a loss of control over the higher centers, over the cord,—it would indicate some destruction of brain substance.

Q. (By Mr. BOWEN) From your investigation, can you state whether or not this man's injuries are liable to be permanent? A. They will be permanent, yes.

Q. So far as the paralysis is concerned? A. Yes, that will be permanent.

(79b) Q. And I believe it goes without saying that the injury to the head will be permanent? A. Yes.

The COURT: That injury to the bone is important principally because it exposes him to greater danger?

The WITNESS: Yes, sir.

The COURT: But, so far as that is concerned, he might live to be a hundred if nothing struck that part of his head?

The WITNESS: Exactly.

CROSS EXAMINATION.

By Mr. ROBINSON:

Q. What department are you connected with at the hospital? A. I am a surgeon.

Q. Do you specialize? A. Yes, I am a surgeon.

Q. Have you talked with Dr. Wise about this case? A. Yes.

Q. Are you aware that Dr. Wise would not give it as his opinion that this man might not get over this paralysis of the arm and leg? A. No, sir.

(79c) Q. You are not aware of that? A. No, sir.

Q. Well, he would not tell the court that he might not get over it. What was the trouble that you spoke of, an increased reflex of the leg? A. Yes.

Q. You mean that when the test is applied he lifts his leg higher than it ought to go? A. No, sir. You understand what reflex means? After a certain stimulant you will have a certain return, a certain reaction. One of the many reflexes is the so-called knee jerk or patella reflex. This is made by having a man cross his legs and then tapping on the patella tendon; in his case the reflex on the right leg was greater than the reflex on the left leg. He has a greater reaction to the tap on the right side than he has on the left side.

Q. Is that all you mean? A. Yes.

Q. Do you mean if he crosses his leg and you tap it there at the patella tendon his foot goes out? A. Yes; there is marked exaggeration.

Q. Is it not a fact that the ability of a leg to kick out like (80) that is regarded among medical men as a mark of virility and strength? A. No, sir.

Q. Do they not test men for nervous strength by tapping their knees to find out whether or not there is a reflex there? A. But there is a difference between a good one and an exaggerated one.

Q. Then it could be too much and it could be not enough? A. Yes.

Q. And that is what you had reference to when you spoke of an exaggerated reflex? A. Yes.

(Testimony of witness concluded.)

Thereupon—

MARTIN MAZURAK, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN (through the Interpreter):

(81) Q. What is your name? A. Martin Mazurak.

Q. Were you working with Frank Imbrovek when he was hurt? A. Yes.

Q. What were you doing? A. Hooking on the net.

Q. You were working down in the hold of the ship with Imbrovek? A. Yes.

Q. Who was hurt at that time? A. Frank Imbrovek and Martin Szczesek; one of them was killed. There were others hurt.

Q. Who was the one that was killed? A. Martin Szczesek; he was not killed instantly but he died in the hospital.

Q. Did you see what hit Imbrovek? A. I did not see it because I was hurt myself and half dead.

Q. Who was the foreman of your gang? A. Lenk.

Q. Who ordered you and the other men to go down in (82) the hold of the boat? A. Lenk.

Q. What time did they go down? A. I do not remember what time they ordered us but I was working on the scow and then I was ordered to go down stairs in the hold.

Q. Were the other men ordered to go at the same time? A. They were working in the evening, they belonged in the hold.

The COURT: Were you in their gang or not; did you all go off the scow together?

The WITNESS: The other part of the gang were already working down there when I was ordered down.

Q. Do you know what time the accident happened? A. I heard one of the people that were telling me that it was about ten minutes of ten o'clock.

Q. Do you know whether it was a dark night or a light night? A. I do not remember.

Q. Do you know anything about these athwartship beams

(83) and whether they have any bolt holes in them or not?
A. I do not remember; I could not see it.

(Cross examination waived.)

(Testimony of witness concluded.)

Thereupon—

WILLIAM MAYEROWICZ, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

Q. What is your name? A. William Mayerowicz.

Q. Where do you live? A. 614 South Wolfe street.

Q. What do you do for a living? A. I work down on the steamers stevedoring.

Q. Do you work as a stevedore now? A. Yes, always a stevedore.

Q. Were you working with Frank Imbrovek when he was (84) hurt? A. I did work together with Frank Imbrovek when he was hurt.

Q. Who else was hurt at that time? A. Frank Imbrovek, Martin Szczesek, the one that was killed, and Martin Mazurak and Jim Cook, I think that is his name, or something like that.

Q. Where were you at the time the men were hurt? A. I was in the hold. I worked down stairs and at the same time I went down to the toilet and I saw the crowd was hurt and I was trying to help them out.

The COURT: This is the man that one of the witnesses said he met coming down the ladder, is it not?

Mr. SEMMES: Yes, this is the man.

The WITNESS: I did not see how the accident happened, I only saw them lying down and I was helping to pull them up.

Q. What hour did you go down there? A. I did not have any watch but it was about eight or half past eight or something like that.

Q. What time did you go to work? A. Six o'clock I went to work.

(85) Q. Did the other men, Imbrovek and Szczesek, go down in the hold with you? A. All together, yes, ten men went downstairs.

Q. About what hour? A. When the work started at six o'clock in the evening.

Q. What hatch were you working at? A. No. 4.

Q. Was the foresection of that hatch on, the middle section off and the after section on? A. There was no section off except the middle one; only the middle one was working.

Q. What did you do after the accident? A. I was frightened and I was trying to assist the people because everybody was screaming and trying to get water to wash their heads off and so forth.

Q. Right after the accident where did you go? A. We went on a scow and then we took all the men on the scow.

Q. Did you then come back on the ship? A. We asked the foreman whether he wanted us to go back and he said, no (86) more, you are all frightened.

Q. Do you know what caused the accident? A. The accident would not have happened if the bolt had been properly fixed, if it was screwed together tight.

Q. How do you know that? A. The bolt fits tight when it is fixed and then it is impossible to come out and the accident could not happen.

Q. How do you know they were not fastened? A. It did not have any bolts at all.

Q. Didn't you examine the hatch right after the accident with the first mate of the boat; didn't you have a lantern and didn't you go and examine the hatch with the first mate of the boat? A. It is all the foreman's fault because he ought to have looked at everything before the men started to work to see if it is proper.

Q. Didn't the mate say that to you? A. The mate took the lantern and looked around that hold and he said, Now look at whose fault it is; I do not think this is our fault because it is the stevedore's fault. That is what he said.

(87) Q. Did the mate say anything else, did he say why it was the stevedore's fault? A. The mate said that the duty of a foreman is to report to him and if this foreman is not satisfied he should notify the second mate or third mate and then, if it should be investigated more carefully, that it should be bolted up more carefully and then go ahead but not go to work in a hurry just to save time.

Q. Did the mate make that statement in English, Polish or German? A. In German, and I understood some German.

Q. Was that the first time that you and that gang worked in hatch No. 4; were these men hurt on Monday? A. I work-

ed Saturday at this hatch in the day time; on Monday they worked at night time.

Q. Did you work in hatch No. 4 on Saturday? A. Yes, we were loading copper.

Q. You worked there on Saturday? A. Yes, in the day-time.

Q. At the same place where this accident occurred? A. (88) At the same hatch.

Q. Was it not hatch No. 3 that you were working on Saturday? A. We worked on hatch No. 3 but we did not take any copper; the copper we were taking into the forward hatch.

The COURT: Did you take copper on Saturday?

The WITNESS: Saturday about four o'clock, yes.

Q. Did you notice the sling come down close to the after section of the hatch? A. I saw when that dropped.

CROSS EXAMINATION.

By Mr. DUFFY:

Q. How were the coverings in that hatch when you were working there on Saturday? A. The same as at the time of the accident.

Q. Were you working through the middle section on Saturday? A. The same section, yes.

(89) Q. Who took off the hatches? A. I do not know because when we work in the daytime they were open and when we came at nighttime different people did this. We worked daytimes and then when the gang would change at nighttime I do not know who would change it.

The COURT: I cannot understand everything that he says, but I suppose that he means by that in short that he does not know.

Q. Did you not relieve a gang at six o'clock that had been working in that same hold loading copper? A. Yes.

Q. How long had the ship been loading copper? A. I cannot tell you that.

Q. Do you know whether the ship that arrived here had discharged part of its cargo before it arrived here? A. I do not know but I think that ship stopped at Boston.

Q. What was the ship loaded with when she came here? A. An assorted cargo.

(90) Q. Did you unload kainite out of that hold? A. I did not work at unloading that hatch.

Q. Do you know who kept the bolts that went into those athwart-beams? A. The ship must supply it. I think the owner of the ship must supply them.

Q. Do you know who had them? A. I do not know.

(Testimony of witness concluded.)

(Thereupon, at 1:15 p. m., a recess was taken until 2 o'clock.)

AFTER RECESS (2 p. m.).

Thereupon—

ANDREW WEBER, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

(91) Q. What is your name? A. Andrew Weber.

Q. Where do you live? A. 513 South Register street.

Q. What do you do for a living? A. I work at stevedoring.

Q. Were you working in the same gang that Frank Imbrovek was working in at the time he was hurt? A. Yes.

Q. Where were you? A. I was down below.

Q. In the hold? A. Yes.

Q. At the same place he was? A. The same place but on the other side.

Q. You were down in the hold? A. Yes.

The COURT: You mean he was on the port or the starboard side, do you remember?

The WITNESS: He was on the port side.

The COURT: And you were on the starboard?

The WITNESS: Yes, I was on the starboard side.

(92) Q. (By Mr. BOWEN) What time did this accident happen, do you know? A. I remember it was fifteen minutes of ten.

Q. At night? A. Yes.

Q. Do you remember what day of the week? A. Monday; the date, I think, was the 23rd.

Q. What month? A. August.

Q. Last year? A. Yes.

Q. Now take your time and go slowly and tell the story of this accident as you saw it. A. When we came down at six o'clock we went right to work. There were two hatches off along side of that ladder that *that* we go down and we were working steady, going up and down and up and down and at that time that this happened our sling was unloaded and on the other side there was that sling that came down and the man (93) that was a hooker-on he hooked ours and said go ahead, and then when we went ahead the hatches came down like a shot.

Q. What do you call this thing that dropped, a hatch or covering? A. That is what we call a hatch but it was the top. They are made of planks about two or three inches thick and they are very heavy.

Q. How many of those hatches or coverings were on on that lower deck? A. Eight hatches on one section; every one has got eight hatches, every section.

Q. How many sections were on and how many were off? A. There was one off and two were on.

Q. Which two were on? A. The forward section was on except two hatches.

— The COURT: That is where you go down the ladder?

The WITNESS: Yes, and the after section was on.

Q. That left just the middle section out? A. Yes.

(94) Q. Is not that on the deck right over where the men were working? A. Yes.

Q. Do you remember how many sections were on on the top deck, away up to the top? A. No, I do not remember that because we have not got time to look at that.

Q. Where was this middle section, do you know? A. Four on one side and four on the other side.

The COURT: Do you mean the boards were placed four on one section and four on the other section?

The WITNESS: Yes.

Q. You saw this sling go up? A. Yes.

Q. You saw it catch on what? A. The cross-piece.

Q. And it pulled that out of its position? A. Yes.

(95) Q. And let that section drop? A. Yes.

Q. And that was the section that dropped on these men?

A. Yes.

Q. Who was hurt? A. Frank Imbrovek and Szczesek and Jim Cook and Mazurak and Jakubczak. The first one I discovered was Mazurak.

Q. Szczesek is dead? A. Yes.

Mr. BOWEN: I suppose it is admitted that these men were employed by the Atlantic Transport Company, is it?

Mr. ROBINSON: Yes.

Q. Did these cross-bars have any holes in them at the ends for bolts? A. Yes.

(96) Q. Were the bolts in them? A. No, sir.

Q. How do you know that? A. Because I could see it if they had bolts in them; if they had had bolts in them they would never have come up.

Q. Did you examine them after the accident took place? A. Yes.

Q. Who was with you? A. Mayerowicz.

Q. Anybody else? A. And the mate.

Q. The mate of the steamship? A. Yes.

Q. What ship was it? A. The Pretoria.

Q. Did the mate make any statement to you, did he say anything to you?

(Objected to; argument.)

The COURT: In admiralty I think it is a safer rule to let it come in for the reason that possibly the Appellate Court (97) may take a different view of this matter and should have all the facts before him.

Mr. BOWEN: Our position will be that here is an officer of a ship who makes a statement immediately after the accident happened and I think it has a very pertinent bearing on the case.

The COURT: I think I will let it come in. I do not think personally that it will have great weight with me but I will let it come because, as I say, the Appellate Court may take a different view of that matter.

Q. What did the mate say? A. The mate said, "Hold on," and then he next spoke in German.

Mr. ROBINSON: Who was the mate talking to?

The WITNESS: He was talking to Mayerowicz.

Q. You, as I understand it, and the mate and Mayerowicz went around and looked at the hatch? A. Yes, the beam.

(98) Q. And the mate took the lantern? A. Yes.

Q. Now, what did the mate say? A. I told him, I said, speak English, I can understand you better. He said—he took and looked at one end and the other end of the beam,—and he said, Look, there is nothing the matter with this beam, this beam is all right, because maybe the company is going to blame us, the ship, and you see now it is not our fault. I said right away, If that cross-beam was bolstered it would not have come out, and he said, Yes, you are right, but if the foreman had let me know I would have sent the carpenter and put the bolts in and in that way they would never have come out. I said, You had charge of that, and he said, No, we did not know what section the stevedore was going to take out; they can take out the cross-pieces if they want to, we have nothing to do with that. That is what he said.

Q. If they had taken out all those hatches and cross-
(99) bars then this accident would not have occurred, would it? A. Not a bit.

Q. If they bolted them in it would not have occurred?
A. No, sir.

The COURT: The statement of the mate is not evidence against the Atlantic Transport Company in any view of it and it is not evidence against the ship except in so far as it emphasizes the fact that the bolts were not in.

Mr. DUFFY: I do not object to that testimony, your Honor.

Mr. BOWEN: Then any objection you may have made to it is withdrawn?

Mr. DUFFY: Yes.

Q. (By Mr. BOWEN) You say that Lenk was the foreman in your gang? A. Yes.

Q. Did you see Lenk down in the hold before the accident occurred? A. No, sir.

Q. When did you see him there? A. After it happened.

Q. Are you still working as a stevedore? A. Yes.

Q. For the same company? A. Yes.

Q. Do they bolt those hatches down now and have they bolted them since this accident?

(Objected to; objection sustained; exception noted.)

Q. Do you know how wide that middle section of the hatch is; how wide is that section fore and aft? A. About that wide and about that thick, with the hatches—

The COURT: He is evidently talking of the fore-and-afters.

CROSS EXAMINATION.

By Mr. ROBINSON:

(101) Q. I understood you to say that when you were working down there in the hold that those bolts were not in there and that you could see they were not in there? A. We have no time, we have to go down to work.

Q. But I mean you could see the fore-and-afters, could you not, right above you? A. Yes.

Q. You could see the place where the bolts went in? A. Yes.

Q. So that if you had looked you could have seen the bolts were out, could you not?

The COURT: During the night could you have seen that?

The WITNESS: No, sir, you could not see anything at night.

The COURT: I should not think a man working with a lantern down in a hold would notice the bolts ten or fifteen feet above his head.

The WITNESS: No, we have to take a lantern to go around (102) and look to do anything like that.

Q. (By Mr. ROBINSON) Do you know, as a matter of fact, whether the stevedores have charge of the taking out of the hatches and cross-beams as they see fit when they load the ship? A. Some hatches fit and some do not.

Mr. ROBINSON: Well, he does not understand me, I will let it go.

(Testimony of witness concluded.)

Mr. BOWEN: As I understand it,—and my brothers will correct me if I am wrong—it is admitted that this man Szczesek was forty years old at the time of his death and his wife is not thirty-six years of age and he has a child Joseph,

sixteen years old, a child John fourteen years old, a child Mary nine years old, a child Eva seven years old, and Stainislaus three years old. With that admission in the case we close our case.

The COURT: But you must have some proof as to the wages that this man made.

Mr. BOWEN: I will have to call another witness for that (103) purpose.

Thereupon—

WILLIAM GIVVENES, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BOWEN:

Q. What is your name? A. William Givvenes.

Q. Where do you live? A. 3235 First Avenue.

Q. What is your occupation? A. Stevedore.

Q. Did you know Martin Szczesek? A. I did know him but not by that name; we only know them by their English names.

Q. But you know who I mean? A. Yes.

(104) Q. He was killed on August 22, 1910, was he not?
A. Yes.

Q. Were you working on the Pretoria at that time? A. Yes.

Q. What were you doing? A. Winchman.

Q. What job did he occupy? A. He was in the hold.

Q. What did you call him? A. I think he is what is called second man.

Q. How much wages did he get, do you know? A. 22½ cents an hour.

Q. What sort of looking man was he, a big man? A. No, short and stout.

Q. Healthy looking? A. Yes.

Q. He did his work all right, did he? A. That I cannot tell.

Q. How long had he been working at stevedoring, do you (105) know? A. I cannot answer that.

Q. How long had he worked down there with the same company? A. To my knowledge about a year.

Q. And his pay was 22½ cents an hour? A. Not his steady pay, but whenever he worked in the hold that is what he got.

Q. Where did he work principally, in the hold or outside? A. That I cannot say, you know, because they generally work wherever they can catch on. If they cannot work in the hold they can go to work on the wharf for 20 cents an hour.

Q. How much does that average a week, do you know? A. I cannot say about them, but I can tell you what I averaged last year a week.

Q. Do you get the same pay as he got? A. I generally get 25 cents an hour.

(106) The COURT: Do they work about the same length of time that you do?

The WITNESS: No, sir, I generally work more.

Q. How much more? A. At times they ask me to stay on what they call a long shift and then we stay at night and all the next day when they are busy.

Q. How long did Szczesek usually work, what was his shift? A. That I could not tell you as to how long he worked at one time, but I know the gang that he went in that night was a gang that turned to at six o'clock.

Q. And when do they knock off? A. At seven o'clock the next morning.

The COURT: Are they paid for twelve or thirteen hours?

The WITNESS: Twelve hours.

The COURT: They make, then, from \$2.40 to \$2.65 a day, according to whether they are working on the wharf or in the (107) hold?

The WITNESS: Yes, you see in the meantime they may lose one or two hours and they get docked for that time too.

The COURT: I suppose the year around that twelve dollars a week would be the average earnings of this man? Would that be about right?

The WITNESS: No, sir.

The COURT: What will they make?

The WITNESS: Last year I averaged \$10.33 the whole year around. I worked for other firms besides this firm, when this firm had no work.

(Testimony of witness concluded.)

Mr. BOWEN: That is the plaintiff's case.

TESTIMONY ON BEHALF OF THE RESPONDENTS.

Thereupon—

EDWARD BARTTHOLL, a witness of lawful age, produced on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. ROBINSON:

(108) Q. What is your name? A. Edward Bartholl.

Q. Are you employed by the Atlantic Transport Company? A. Yes, I am employed by the Lorant Stevedore Company which is a branch of the Atlantic Transport Company.

Q. In what capacity are you employed? A. I am head foreman.

Q. How long have you been with them? A. I have been head foreman now about seven years.

Q. Then you were in the employ of the company on the 22nd of August, 1910? A. Yes.

Q. Do you remember an accident that occurred down on the Steamship Pretoria on that date in which a man was killed and several men were injured? A. I was on day duty that week and that happened at night.

Q. You were not on the ship at the time the accident happened? A. No, sir.

Q. Did you have anything to do with the stevedoring on board the Pretoria? A. We had been discharging ship up to that time and putting a cargo into the ship.

Q. What port did she come to Baltimore from? A. Boston.

Q. Did she discharge part of her cargo at Boston? A. Yes.

Q. Having discharged part of her cargo at Boston she came on to Baltimore? A. She also loaded some cargo at Boston.

Q. She came down here and finished both loading and unloading? A. Yes.

Q. Did you receive any notification from the Atlantic Transport Company about taking charge of this boat,—by the way, what were your duties? A. As a general rule when a ship comes into port, as soon as she is made fast and as soon as (110) the customs officers get through with her, they turn the vessel over to us and we go ahead with the work and start to discharge and load.

Q. Who turn the ship over? A. It is a common thing for us as a regular rule, as soon as the ship is boarded and the customs authorities let us go aboard the ship, for us to take the hatches off and start right up.

Q. Who is that? A. Stevedoring company, of course.

Q. You mean the Atlantic Transport Company? A. Yes.

Q. You take charge, then, do you? A. Yes.

Q. When the ship comes in and you take charge are her booms rigged up? A. Yes, the crew always rig the booms up for us.

Q. The ship's crew? A. Yes.

(111) Q. Do they fit the tackle on the booms? A. They do everything; the booms are put up there ready for work and we place them the way we want them placed.

Q. That is, you move the booms? A. Of course, we have got to move the booms to put the cargo in the side or in the hold to be loaded or discharged.

Q. What authority have you over the opening or the closing of the hatches? A. If it is any kind of a fair day at all and we think we are not going to have any bad weather we generally take as many hatches off as will let us work along nicely without doing any damage to the cargo. If the weather is threatening we take off as few hatches as possible. What I mean is that if a hatchway has in it three sections and if the weather is threatening we will take one section off. We will take off the section that is best for our work.

Q. Have the ship's officers anything to do in controlling (112) the removal of the hatch coverings? A. No, sir, we do that ourselves, we take off and put them on.

Q. Is your company, the Stevedoring Company, responsible for the dry loading of the cargo and the protecting it from the weather? A. Yes, we must keep the cargo protected to keep it from getting damaged in any way.

Q. Your duty is to load and unload the cargo and protect the cargo in that process of loading and unloading? A. Yes, we must protect the cargo in all cases.

Q. Under those circumstances then I suppose you have full authority, have you, to remove the hatches and put them on? A. Yes, if we see fit to take any hatches off we take them we take them off and if we do not see fit to take them off then we do not take them off.

Mr. ROBINSON: May it please your Honor, as I understand the case at the present time, there has been no proof offered here to sustain the allegation that these derricks and (113) booms were not properly rigged up. That allegation is made in the libel. As I understand the proof at the present time there is nothing on that subject that would point to an improper rigging of the derricks or booms.

The COURT: The negligence now exists in either not taking off all the covers or, if they decided it was best on account of the weather or other conditions not to take off any more than they had to take off, their not having bolted those that were left on. Now that is the only evidence of negligence that has been produced. I do not think, therefore, that you need talk about the boom because the immediate cause of the accident is not apparently disputed. The nets, as it went up, did not go up quite true but caught under the after section of the hatch or the cross-beam and brought the whole thing down. That, I might say, is undisputed.

Q. (By Mr. ROBINSON) Will you please explain to the court how these hatches are covered; this is a blue pring here of the ship; now is that the hold that the accident occurred in? A. Yes, No. 4 hold.

Q. This hold is closed, as I understand it, by three (114) athwartship beams? A. Yes.

Q. That fit into iron shoes? A. Only two athwartship beams.

Q. Two athwartship beams that fit into iron shoes that are themselves fitted on the combing of the hatch covering? A. Yes, they are called the cross-beams.

Q. These are the fore-and-after? A. There are middle fore-and-afters and two side fore-and-afters; according to this drawing there are three section hatches, while this ship only has two hatches. In this here it has got two side hatches and one in the centre; this ship had one middle fore-and-after and two side fore-and-afters.

Q. Is not that a rough sketch of it? A. Yes, but that is different from the drawing. This is the middle fore-and-after and these are the side fore-and-afters. The hatches fit over the side combings and this middle fore-and-after is made like (115) that, and the hatch fits right across like that. (Indicating.) These hatches fit right on top of them. It just holds it so that if anybody gets on top they will not break through.

Q. It was under this piece here, was it, that it caught? A. No, sir. I will give you a rough sketch of the cross-beam for that. There is a little projection that comes down on this

cross-bar and there is this projection that goes over here. That is the junction of the iron beams. This piece is the piece that fits against the hatch combing. This part here fits into this shoe here and the hatch combing is on a bevel like that, and, according to the way I understand it, when the hook came up it caught on this shoe like this where the fore-and-after fits in.

The COURT: In the middle of it?

The WITNESS: Yes.

Q. Is it through here that those bolts go? A. No, sir, there is a bolt hole right through the cross-beam and through this hatch-combing and these fasten one on each side.

The COURT: And then it cannot pull up?

The WITNESS: No, sir, it cannot pull up. The bolt goes (116) through the combing and the cross-bar and it comes right out on the deck. The combing sits that high up on the deck and the bolt goes through the beam and the combing and they are screwed together.

Q. (By Mr. BOWEN) Can you see that from the hold of the ship? A. You can see the bolt-head from the hold of the ship.

Q. (By Mr. ROBINSON) It is perfectly possible for men who are down in this hatch looking up to see whether that bolt comes through there and whether it is through or not, is it not? A. If they have any doubt about it then it only takes a half a minute to go up there and see.

Q. As I understand it, then, when the ship gets into Baltimore she is turned over to the stevedore company? A. Yes.

Q. And the stevedore company proceeds to load and unload her? A. Yes.

Q. And during that time the stevedore company has complete charge of the hatches and the covering to the same? A. Yes.

Q. Opening them and taking out the athwartbeams and fore-and-afters and so on? A. Yes.

The COURT: Whose business is it, according to your view of the question, to cover up the hatches after the stevedores are through?

The WITNESS: Your Honor, we always close them up ourselves, sir.

The COURT: Do you mean after the ship is loaded?

The WITNESS: Any old time at all.

The COURT: The reason I ask the question is that I remember one case we had here, the case of Brady against Foard Company, where we had representatives of all the stevedoring concerns in town on the stand swearing it was not their business to close the hatches at all, that the ship always did it. I let (118) the stevedoring firm off in that case under that testimony.

The WITNESS: We always close them up, sir, always.

Q. Do you mean to say that while you were loading and unloading or after you finish loading or unloading? A. Any old time at all that we think the weather will get bad we always put the hatches on. Yesterday afternoon we knocked the ship off and closed the ship up completely and went down this morning at seven o'clock and took the hatches off again.

Q. Do you know how it happened that these hatch covers were on this particular hatch, that is to say the fore-and-after covers? A. They had never been taken off to my knowledge from the time the ship got in port, not that deck that fell down.

Q. Why had they not been taken? A. There was no necessity for taking them off; we did not require that section of hatches at all, we had enough in the other two sections.

(119) Q. If you had taken them off in case of rain— A. Not those hatches, because they were down below.

Q. So that there was no necessity for taking off anything but the middle hatch? A. No, sir.

Q. Why not? A. Because we had plenty of room to work that hatch without it.

The COURT: Then how did this accident happen?

The WITNESS: I was not there at the time and I do not know, but I know we worked the hatch the day before that and nothing like that could have occurred at all. If the men down in the hold had been doing the work properly and steadying the sling the thing never would have happened.

Q. How big is this net? A. This net is about four feet by four feet, may be four and a half feet by four and a half

feet, and then it has four bridles on it. There are two iron (120) shackles and there are two bridles to each shackle.

Q. Is this a rough drawing of it? (Handing paper to witness.) A. No, sir, that is not anything like the net at all. If you will give me a piece of paper I can show you just how the net is. The net is perfectly square like that piece of paper. Then there is a heavy mat goes inside and a heavy mat goes on the outside and the bridle is made fast to this corner and a bridle there and a bridle there and it goes up into these iron shackles and it is the shape of a U and there are two and then there are the bridles in each shackle. These men if they had hooked these two bridles on nothing would have happened, but they hooked one bridle on and the other bridle hooked underneath the cross-piece. Even if they had hooked just one bridle on if they had steadied the net the thing would not have happened.

Mr. SEMMES: Were you there?

The WITNESS: No, sir, but I have had so much experience that I know just what happened.

(121) Mr. SEMMES: You are speaking of not how it happened but how you think it happened?

The WITNESS: Yes, I have worked in the same hatch.

Q. (By Mr. ROBINSON) Having regard to the size of the net and the way in which that boom was rigged,—how wide was that middle section, do you know? A. It was not over sixteen feet wide and about ten feet long.

The COURT: You mean it was ten feet fore and aft of the ship and sixteen feet athwartship?

The WITNESS: Yes.

Q. Having regard to the size of that amidship opening and having regard to the net and rigging and boom, was there ample room for the safe loading of that copper if the men had been careful? A. I considered so, yes. We have worked far smaller spaces than that at times.

Q. Do you know whether or not any other gang had been working in that hold? A. I had a gang working in there the (122) day before the accident happened and that same afternoon that the accident happened; the accident happened at night.

Q. Doing what? A. Taking copper in.

The COURT: Did you see whether the other sections were bolted down?

The WITNESS: No, sir, I did not look at that.

The COURT: You did not pay any attention to it?

The WITNESS: No, sir.

Q. Were the booms rigged in the same fashion? A. Yes.

Q. Did you use the same net? A. Yes, same net.

Q. And you loaded copper into that hold with that gang how long? A. I judge we stopped that afternoon about half past three or four o'clock.

Q. What day was that? A. That was the day before this accident happened.

Q. The accident happened Monday night and this was Monday afternoon? A. Yes.

(123) Q. Was any loading done in the hold prior to that time? A. I do not think so; the copper was the first thing that went into the hold.

Q. Was anything unloaded? A. Yes.

Q. What was taken out? A. We took some kainite out.

Q. Did you have the same rigging? A. We had the same rigging only we had the small section of the hatches off on the forward end.

Q. On what deck was that? A. On the upper deck.

Q. Do you mean the top deck of all? A. Yes.

Q. Were the hatch covers on this hatch which pulled off when the accident occurred, were they in the same condition when you were unloading? A. They were in the same place so far as I know, sir.

The COURT: How long would it take to put those bolts in (124) on the fore and after sections of that hatch?

The WITNESS: It would not take the men five minutes to put the bolts in.

The COURT: It is the business of the foreman to tell them to do it, isn't it?

The WITNESS: No, sir, we generally notify the officer of the ship and he sends the ship's carpenter down to do that.

The COURT: It is the part of the ship's carpenter to do that?

The WITNESS: Yes.

Q. Do you know who took these particular bolts out at that time? A. No, sir.

Q. Do you know whether the bolts were taken out when the ship got into port? A. I do not think there were any bolts in there, sir; I think the bolts had been taken out at Boston and not put back again.

Q. Who takes charge of these bolts? A. The ship's carpenter comes around and gathers them up so that in case we (125) want them again we know where to get them.

Q. If the foreman wants the bolts put in he goes to the ship's carpenter? A. He goes to the officer on watch.

Q. And he directs the ship's carpenter to put them back? A. Yes.

Q. Suppose when the ship comes in and she is turned over to the stevedores and the bolts are in these cross-bars, who takes them out? A. As a general rule the stevedore takes them out.

The COURT: Sometimes the ship does it?

The WITNESS: You see when the ship comes in like that we turn six or seven gangs to at one time and it would be too much for one man to take these bolts out and the stevedores come along and if they find the bolts loose they take them out and put them along side of the hatch and the ship's carpenter comes along and gathers them up.

The COURT: And if he is along there himself he helps to take them out?

(126) The WITNESS: Yes, and as a rule we have the hatches off before he gets the ship fast.

Q. You do that to save time? A. Yes.

Q. And the stevedores often take the bolts out themselves? A. Yes.

Q. It is not the special duty of the foreman to do that, then? A. No, sir.

Q. Do I understand you to say that the stevedores when they take charge of the ship have in their management all the booms and hatches? A. Yes, all the time, the crew never helps us out with the beams and hatches.

Q. Do you know whether any cargo was unloaded out of that particular hatch where the accident happened, in Boston? A. I am pretty sure it was; if I had the old stow-plan I could tell you, but I think there was cargo taken out of the hatch in Boston.

The COURT: I will let that in but you see yourselves that this witness does not know.

(127) Q. Who would know about that? A. Mr. Shimmick would know.

The COURT: You did not testify in the case of Brady against the Foard Company, did you?

The WITNESS: Yes, sir.

The COURT: What did you testify when you were asked as to whether it was the business of the stevedores or the ships to put these hatches on after loading or unloading?

The WITNESS: I told them at that time that we always put our hatches on.

Q. You testified for which side? A. I think it was the plaintiff's.

The COURT: And the other stevedore witnesses all testified that the stevedores left it to the ship to do, did they not?

The WITNESS: You see, your Honor, they have a different line of work, they only handle iron ore. We handle general cargo. If any water goes down their holds it cannot hurt that character of cargo but if any rain or anything goes down in the hold of our vessels it is bound to do damage but it would never do any damage down in the hold of an iron ore ship.

(128) The COURT: So it does not do damage to the cargo, but the only thing that bothers you or the ship is damage to the cargo?

The WITNESS: Yes, that is it.

(Testimony of witness temporarily suspended.)

(Thereupon, at 3 o'clock p. m., an adjournment was taken until tomorrow morning at 10 o'clock.)

(129)

May 20, 1911.

SECOND DAY'S PROCEEDINGS.

Thereupon—

EDWARD BARTTHOLL, a witness heretofore sworn and whose examination was temporarily suspended pending adjournment, resumed the stand for

DIRECT EXAMINATION (Continued).

By Mr. ROBINSON:

Q. As I understand it, when the Steamship Pretoria came into port after getting through with the Custom House preliminaries she was turned over to this Atlantic Transport Company, is that right? A. Yes.

(130) Q. What disposition, if any, did you make of the gangs of stevedores? A. I sent them into the different hatches where the cargo was. I sent a foreman to each hatch. Those foremen send the men on deck and the deckmen and winchmen get everything ready on deck while he gets ready on the pier and connects the scow in place and everything so that when the cargo comes out he knows where it goes on the different piers and where it goes in the different holds of the ship so that he will have everything in working order as soon as a sling-load comes out.

Q. Whose duty is it to engage these men, your duty?

A. It is not entirely my duty; I tell the different foremen and each foreman has his own gang; he has that gang at all times.

The COURT: And he replaces men if he wants?

The WITNESS: Yes, he places the men the way he wants.

The COURT: I mean he employs men when he wants them, does he?

(131) The WITNESS: Yes.

Q. (By Mr. ROBINSON) What authority has this foreman in placing the men at work? A. As a general rule we have a regular man on deck and a regular man in the hold; we always have the same men in the hold at all times and the same men on the wharf at all times.

Q. Do you know the men who were working in this gang when the accident happened? A. I was not on duty at that time but I know all the men because they work for me and they were shifted from my turn into that turn about two years ago.

Q. How is that gang made up? A. You see we make the gangs up—

Q. But just to save time I will ask you in this way: I mean to say what position is it necessary to provide for, you have a watchman and a signal man and a man in the hold? A. Yes, we have a man on deck and two winchmen and we have two leaders in the hold to discharge and we have two leaders and six men besides that, that is four men on each side dis-(132) charging cargo, but in loading we always have ten men in the hold. We have a leader on each side and he gets a little more than the others and he is supposed to see that the stowage is done properly; he is supposed to see that the cargo is set properly.

The COURT: He is a sort of a sub-foreman?

The WITNESS: Yes.

Q. (By Mr. ROBINSON) As I understand it, there is one man in the hold whose duty it is to hook and unhook the net? A. I will tell you how we work that. Very often when we are taking in copper or something like that, just to facilitate the work and keep on moving a little lively, we put an extra man in the hold and just give him the job of hooking on the net or steadying the net. He will jump in and get a sling load away by the time the other net comes in.

Q. You are a practical stevedore, are you not? A. I ought to be by this time.

Q. Will you please tell the court what the duties of the (133) man are who hooks on the net? A. When we put a man down to hook the nets on all we look for him to do is to go to work and hook the net on and steady it and see that that net goes up straight while the other men are taking the freight out of the nets.

Q. You speak of there being a man on deck besides two winchmen, what are the duties of that man on deck? A. All he has got to do is to tell them to go ahead and come back and see that the sling loads go ahead in proper shape and that the sling loads are straight. In taking in different commodities of flour or something like that, if it is a bad sling-load he has got to stop and his duty is to tell them to go ahead or come back and stop and let the men work properly.

Q. That is to say he is a signal man? A. Yes.

Q. And he gives the signals to the winchmen? A. Yes.

Q. There are two winchmen, one an out-haul and one an in-haul, is that right? A. Yes.

(134) Q. From whom does the signal man on deck get his signal? A. Nobody at all, he is supposed to see that.

Q. He is supposed to look down in the hold? A. Yes, he is supposed to look down and see all that himself, that is what he is there for.

Q. And when he sees the net hook on them he gives the signal to the winchmen? A. Yes.

Q. Then when he gives the signal to the winchmen it is the duty of the men to steady the net and see that it goes up straight, is that right? A. Yes, that is what he is supposed to do.

Q. What was the name of the man who was signal man on this occasion? A. Frank Kalet.

Q. He was signal-man or deck-man? A. Yes.

Q. And this man who testified yesterday, Martin Mazurak or Mike Brown, he was the net man? A. Yes, he is the man who hooked the nets on.

(135) Q. And the foreman of the gang was a man by the name of Lenk? A. Yes.

The COURT: It is not very material but of course you do not know who were actually doing those particular things that night if you were not there?

The WITNESS: No, sir, I was not there at the time.

The COURT: But that would be their work, that would be their regular place and you would assume that those were the men who were doing that work unless something turned up to the contrary?

The WITNESS: Yes, and I was told the following morning that they were there.

The COURT: That, of course, is more or less hearsay but I will accept that as probable.

Mr. ROBINSON: Do you want it confirmed, because it is very material for us to get that in?

The COURT: Well, you know that that does not absolutely prove it. I should be personally inclined to assume that they were the men doing it if I heard nothing further about it.

(136) This gentleman's testimony is that those men were in the gang and that was their regular duty and he supposed they did it on that night.

Q. Are these men paid by the hour? A. All except the foreman. Of course the foremen are paid sometimes by the hour too but we do not generally pay our foremen by the hour. If the men make an hour they get paid for that hour and if they make an hour and a half they get paid for an hour and a half.

Q. I want you to tell the court the character and weight approximately, if you can, of those athwartship beams that separate the hatch covers and the fore-and-aft pieces. A. Do you mean the beam that fell in the hold?

Q. Yes. A. There were different sizes of those.

Q. I mean that particular beam. A. That particular beam weighed about sixteen or seventeen hundred pounds.

Q. Made of iron, isn't it? A. Yes.

Q. How heavy are these fore-and-aft pieces that rest on the beam and on the hatch combing? A. I judge the middle (137) fore-and-aft will weigh about three hundred and fifty pounds—hardly that, about three hundred pounds. The middle fore-and-aft is made out of wood.

Q. Are there one or two of those? A. Three of those, the side fore-and-afts are only six by six.

The COURT: The middle fore-and-aft is more substantial and weighs more?

The WITNESS: Yes, the middle fore-and-aft is ten inches in height where the side fore-and-afts are only six inches in height.

Q. What is the character of these hatch covers themselves? A. The hatch covers are made out of about three by twelve lumber, three inches thick and about twelve inches wide, and there are two pieces to the hatch, that is about twenty-four inches wide and about eight feet long.

Q. Are they yellow pine or oak? A. Yellow pine.

The COURT: What will they weigh, one hundred and fifty pounds apiece?

The WITNESS: About that, I guess; it is about as much (138) as two men want to lift, as much as two men want to go out there and lift at a time.

The COURT: Including the separate pieces that were on that, there were about two tons?

The WITNESS: Yes, I suppose it would be all of that, a ton and three-quarters or two tons, something like that.

Q. Have you got the plans showing the way in which that cargo was loaded into the hold on that particular ship when she was loaded in Germany and showing what part of the cargo was assigned to Baltimore and what to Boston? A. Yes.

Q. Will you produce it to the court?

(Witness produces stow-plan.)

The COURT: What is the bearing of this?

Mr. ROBINSON: What we propose to do is to show that part of this cargo had already been taken out in Boston when the ship came here, and in the second place a large part of the cargo in that hold had been taken out here at Baltimore and the hatches were in exactly the same shape in which they were before.

The COURT: And you mean to show that no accident had happened before?

(139) Mr. ROBINSON: Yes, sir, that no accident had happened.

The COURT: I suppose you might admit that, Mr. Bowen, that considerable cargo had been taken out?

Mr. BOWEN: I think so.

Mr. ROBINSON: We want to show that those hatch covers might have been taken off in order to get that cargo out, and that the bolts had been taken out, of course—

The COURT: But Mr. Bartholl says it only took five minutes to put them in or take them out. Now what happened here in Baltimore is material but I do not think that other is material.

Mr. ROBINSON: Then I will let that go. We will assume, then, that the bolts were in there at Boston?

The COURT: We will assume nothing about it; Boston is out of it altogether.

Q. It appears from that plan that there was a lot of kainite in that hold? A. Yes, about a thousand tons.

Q. Was that kainite taken out before the copper was put in? A. It had to be, yes.

(140) Q. And I believe you did testify that the hatches were in the same condition, so far as you know, the whole time the ship was in Baltimore as they were at the time this accident happened? A. Yes.

Q. That is to say that the middle compartment was open and the fore-and-after part of the hatch was covered? A. Yes.

Q. I presume from that that it is no uncommon thing for your stevedoring company to load and unload a ship with hatches fixed in that way? A. We have to do it seven times out of ten almost.

Q. Why? A. Because we get the commodities that have to go in the hold, in the lower hold, and one thing goes on one deck and another thing on another deck. If we had to strip these hatches every time why we would not be doing anything but putting on hatches and taking off hatches all the time.

Q. Is that the reason, then, that the fore-and-after part of these particular hatches were kept on? A. Yes.

Q. To facilitate the loading on the next deck above? A. (141) Yes, to give the ship dispatch. It takes too much time to take these hatches off and put them on all the time.

Q. Did you ever hear in your experience of an accident happening in this way before, the net catching under the cross-beam and causing it to come down? A. No, sir.

Q. Notwithstanding the fact that you have often loaded ships in the way in which this ship was loaded? A. Time and time again, yes.

Mr. ROBINSON: I now think, may it please your Honor, that it is necessary to get a description in the record of this net. We got some sort of a description of it yesterday but we do not think it is adequate.

The COURT: I rather think it is material and I have no objection to your doing it. Is it not practicable to make a little model of it and put it in as an exhibit? It seems to me almost impracticable to describe it with any degree of accuracy and you will have the same difficulty to-day that you had yesterday in that respect.

(142)

Q. (By Mr. ROBINSON) Could you furnish us with a little model of this net? A. It would take a man a whole day to make a model of a net like that, but I can come pretty near

telling you on a piece of paper how the net is made. If you want to go to the trouble you can get the exact size of the net from Canton from the man who makes the net. You can get it from him to the inch.

Mr. BOWEN: The ship will be here Monday with the net and we could probably get that very net then.

The WITNESS: The nets belong to the stevedore company.

Q. Is this end circular or is it square? A. It is square.

Q. About what are its dimensions? A. The net is about four feet six inches square.

Q. This net, as I understand it, is made out of hard rope? A. The middle part of the net is made out of Manilla rope.

Q. And it is in a mesh? A. It is made into meshes and they are about a quarter of an inch apart and the ropes go that way, and on the bias, and they are linked into one another. The middle part is made out of rope and there is a tar mat on 143) each side made out of tar rope, out of tarred hemp.

Mr. BOWEN: That is on the bottom.

The WITNESS: One is on the bottom and one is on the top.

Q. So that in the very bottom of this net you have this tarred rope? A. Yes, in the very bottom of the net is tarred rope and on top the Manila rope is tarred again so that the men can turn it upside down and keep the net from chafing.

The COURT: I think what you want to get is the construction at the top of the net.

Q. (By Mr. DUFFY) You say the net is square? A. Yes.

Q. What is that square made of? A. Do you mean the part that you hook on to the hook?

The COURT: How is the rim of the basket made?

The WITNESS: This thing lies flat on the ground, sir, just as if you were to put a rug on the ground, and on the outside is four-inch Manila rope. Now what draws this together is—

Q. You mean to say that the rim of the basket in this part of it here, the ropes all go down and make the net; now is that part made out of rope? A. Yes.

(144) Q. And that is square? A. Yes.

Mr. ROBINSON: We will engage to furnish a photograph of one of these nets so that it can go into the record.

The COURT: I think that will be better. According to the record yesterday some carelessness must have occurred in fixing the front part of the net, otherwise it could not have gotten caught.

Q. We can get that very net, can we not? A. No, that net is pretty well worn out but you can get one just like it. All the ropes are cut the same length.

Mr. ROBINSON: Is that agreed, Mr. Bowen?

Mr. BOWEN: That is agreeable to me.

Q. (By Mr. ROBINSON) I understood his Honor to say just now that he understood from your testimony yesterday that you said that the only way in which this accident could have happened—

The COURT: Of course, he was not there and he was testifying from his opinion.

Mr. ROBINSON: (Continuing)—was because of the failure (145) of the net man to hook on both of the bridles? A. Yes.

Q. Could it not have been by the failure of the netman to steady the net after it started up? A. Even if he had steadied the net it would never have hooked on going up.

The COURT: Why could not one of those meshes caught?

The WITNESS: The meshes are all closed up by these mats; these mats are closed right up, the nets are all closed up.

The COURT: All the way up?

The WITNESS: It takes in the whole top and bottom of the net. These mats are put on to protect the nets, to keep the nets from wearing out.

The COURT: What are the mats made of?

The WITNESS: Hemp rope, tarred rope, about nine-sixteenths of an inch in diameter they are. They are small ropes.

The COURT: If any of them become chafed or broken that mat could hook in them?

The WITNESS: We never allow them to get in that bad condition because every ship that goes away we overhaul the (146) nets.

Mr. ROBINSON: There is no claim that the net was in bad condition.

The COURT: The claim is that the net hooked into the cross-beam and pulled it down and I should not hold them down to the allegations as to the way that hooking took place.

CROSS EXAMINATION.

By Mr. BOWEN:

Q. As I understand from your testimony, when the ship comes into port the stevedore takes complete charge of it? A. Yes.

Q. When this ship came into port with the hatches on you took them off? A. Yes.

Q. Do you remember which hatches were on on the main deck and which hatches were off, in No. 4 hatch? A. Do you mean the top hatches?

Q. Yes. A. They were all on when the ship came into port.

Q. Which ones did you take off? A. I think, as far as (147) I can remember, just at the present time, we took the two forward sections off.

Q. Is it not a fact that only the middle section was out? A. You see between the time this accident happened and the time the ship came into port there was a Saturday night and Sunday and Sunday night that intervened, and we do not work the ships on Saturday night or Sunday or Sunday night, so we have to put the hatches on on Saturday night to protect the cargo until Monday morning.

Q. Then at the time of the accident the only hatch covers that were off were those of the middle section? A. So far as I understand, yes.

The COURT: He was not there.

The WITNESS: I was not there but that is what I understand. The only section that was off before six o'clock that night was the middle section.

Q. How much does it cost you to take one of those hatches off? A. It does not cost much to take them off one time, but if you have to do it a half-dozen times in the course of a day it would cost a whole lot of money.

Q. Can you figure out how much it would cost to take (148) one of those hatches off?

Mr. DUFFY: I object to that.

The COURT: I rather think it is admissible very much upon the same ground of the Supreme Court decision in the Standard Oil case on the question of what is a reasonable precaution depends upon the cost of it.

Mr. BOWEN: He stated in his testimony that it took up so much time to take these hatches off that I want to inquire into that.

(Exception noted.)

The WITNESS: Say we only take one deck off; if we take one deck off it would take about fifteen minutes. Consequently that stops a whole gang of men about fifteen minutes. Well, fifteen minutes at about five dollars and a half an hour it would cost about \$1.40. That is one deck; now suppose we have to take three or four decks off.

The COURT: As I understand it, it does not take the whole gang to take the covers off,—

The WITNESS: But we have to pay the gang, we cannot dock the men.

The COURT: But you have not let me finish. Could not part of the gang be taking off one hatch while another gang is (149) taking off the other hatch so you will not be losing that time?

The WITNESS: But supposing, your Honor, that we go to work and put four men on one deck and four on the next and four on the next, it takes time to bring the men on the ship and get them down the ladders to take these hatches off.

Q. But the gang could take off four hatches in less than hour? A. In about an hour's time.

Q. It would take a whole hour to take off the whole number of hatches? A. Yes, to take the four sections off and the cross-beams.

Q. If it only took fifteen minutes to take off one it would not take, with that distribution of force, so very long to take off four? A. If they took the hatches off then the men have to stand there until the sling comes down and takes off the four and after and cross-beams; those are taken off with the hook.

Q. It would take about an hour, then, according to your (150) estimation, to take the hatches off all the way down? A. Yes.

Q. Have you ever tried it? A. Time and time again, we have tried it on every ship.

Q. Do you always pay stevedores for the time consumed in taking off hatches?

(Objected to; objection overruled; exception noted.)

A. If a ship is coming into port and all the cargo is in the lower hold, we have got to take all those hatches off and we have got to take every man we have employed for the time he is engaged in that work.

Q. That is not exactly an answer to my question. Do you always pay the stevedores who take the hatches off for the time consumed in taking those hatches off?

(Objected to; objection overruled; exception noted.)

A. Yes.

Q. You always do that? A. Yes.

Q. And you always have done it? A. Yes.

(151) Q. You are positive of that? A. Yes.

Q. And you always pay the stevedores who are waiting while those hatches are being taken off? A. Yes. Many a time we have jobs outside so that we can get them doing little odd jobs on the outside.

Q. But they are not standing there waiting? A. Many times they are standing there waiting.

Q. And they get paid for that? A. Yes.

Q. Full pay? A. Yes.

Q. All the time? A. Yes.

Q. You say that somebody told you or that in your opinion, one or the other, that this accident would not have happened if this sling had been entirely hooked on? A. I do not think it would.

Q. Is it not possible for that sling to catch on the side of that beam even if it is hooked on? A. How do you mean, by both bridles?

Q. Yes. A. No, sir.

(152) Q. Not by any possibility? A. No, sir.

Q. Is not this sling made of rope? A. Yes.

Q. Has it an absolutely smooth surface? A. Of course when the sling goes into the bridle it hangs straight.

Q. Does that sling curve? A. No, sir.

Q. Is it not crescent-shape? A. No, sir, it closes up like a book.

Q. What becomes of the bottom, does that lay perfectly flat? A. No, it does not lay flat at all, it lays like this book would when it is closed up. (Illustrating.)

The COURT: How much does this particular net weigh?

The WITNESS: I judge this net weighs about two hundred pounds or close to that, or one hundred and seventy-five pounds.

The COURT: Would it be actually too much trouble if we did not finish this case today to have a net like that here so we (153) could see it?

The WITNESS: We could have a net like that up here, that would be no trouble at all.

Mr. ROBINSON: Is it not a fact that this net is like a woman's pocket-book and it is opened that way, and when you put the bridle on it it closes up flat and then goes up that way? (Illustrating.)

The WITNESS: Yes, when the bridles are on it it closes up flat.

Q. (By Mr. BOWEN) These points come together? A. Yes.

Q. Do they come toward the centre? A. No, sir, not when the net is empty but when the net is full it makes a kind of basket like and draws up something like, but when the net is empty it comes up like. (Illustrating.)

Q. When the net is empty, does the bottom of that sling remain perfectly flat? A. Yes.

Q. It does not curve? A. No, sir.

Q. If that sling is perfectly flat when it is empty and in (154) going up, how thick through is it? A. About a foot.

Q. How big is the hook that the bridle is hooked onto? A. It all depends; we have got different size hooks, but as a general rule when we work copper we work a heavy hook.

Q. What is the size of that hook? A. About that wide across. (Indicating about six inches) and the hook is about eight or nine inches long.

Q. Then, in your opinion, there is no possibility of the mesh of that sling catching in the little pockets or sockets on the side of that beam? A. No, sir, because these cross-beams are all protected on the bottom by a round piece here, and if that net came up and hit the bottom of the cross-beam it is going to throw it off.

Q. Suppose the hook goes up and catches the beam? A. The hook cannot do that.

Q. Why not? A. Because the hook has a lip on it.

Q. Is that lip round or straight across? A. That lip falls down on—I can show you on a piece of paper very easily.

(155) The COURT: Bring one of the hooks with your net.

The WITNESS: The lip closes down; when you hook the net on the lip closes down on the hook and there is no place on that hook to catch anywhere.

Q. There is no doubt that something on that sling or hook caught that cross-beam and pulled it out and dropped the hatch, is there? A. The bridle might have caught it but nothing else could have caught it.

Q. Something did it, whether it was a bridle or what it was? A. Yes, something did it.

Q. If the bottom of the socket was round, how could the bridle catch it? A. The bottom of which socket?

Q. On the side of the athwart beam. A. That is square, not round.

Q. I thought you said it was round? A. No, sir, I never said that at all.

Q. You understand what I mean, do you? A. The socket where the fore-and-after sits on?

(156) Q. Yes. A. That is square, but where the cross-beam goes across there is a half round iron on it, on the side of the cross-beam or the bottom of the cross-beam.

Q. That is the bottom of the cross-beam? A. Yes.

Q. But I was talking about the socket. A. I beg your pardon, then, I misunderstood your question. That is square.

Q. Then the bridle could have caught that? A. Yes, the bridle could have caught that.

The COURT: Why could not the hook catch it?

The WITNESS: The hook is closed up, the hook has a lip to it, it is like a fish hook and then it works on a pin and there is a lip to that and it falls right over the top of this and there is no way possible for it to catch.

Q. Does not that lip go directly across? A. No, sir, that lip hooks down like that. (Indicating.)

Q. What, according to your conclusion, is the total weight of this section that fell, including the cross-beam?

(157) The COURT: He figured it out pretty carefully that it would be somewhere about a ton and a half or two tons.

Q. As I understand it you do not know whether those bolts were in place when the ship came in here or not; I think you said you did not make any inspection of that? A. No, sir, I did not.

Q. Could the accident have happened if those bolts had been in place? A. No, sir.

Q. Did you see the particular hook which was used on this occasion? A. No, sir.

Q. Have all the hooks that are used down there those lips that you describe? A. All the hooks that we load cargo with are of the same description.

Q. There is no doubt about his hook not having a lip to it? A. No doubt in the world because we would not trust it in taking any copper.

Q. Didn't you say that the ship's crew rigged up the booms and tackle? A. They rigged up the boom, sir.

(158) Q. Don't they rig up the tackle also? A. What do you mean by tackle?

Q. The falls. A. They put everything up for us to go to work with, the falls and running gear and everything; all we do is to place the booms the way we want them and then load the ship.

Mr. SEMMES: Do they supply the hooks?

The WITNESS: No, sir, we supply our own hooks.

Q. (By Mr. SEMMES) Is not the hook a part of the fall? A. No, sir, because one-half the ships have not a hook aboard ship.

Q. That part of the tackle, then, you supply? A. Yes, we furnish the hook.

Q. What is this bridle composed of? A. The bridle on the nets?

Q. Yes. A. We have the bridles made out of rope and then we have an iron bridle the shape of a "U" that we hook into these iron hooks.

Q. The bridle that you use to fasten, what effect has that (159) in lowering this net? A. It has not any effect at all,

sir. You fasten these two parts into the hook and lower them down.

Q. Then when you unload them you spoke about fastening to the bridle, what did you mean? A. Yes, he hooks this one bridle on that is made out of iron, and they way I understand it they hooked one bridle on and left the other unhooked, and if you only hook one bridle on it leaves the end hanging like that, (indicating) and this other bridle would be hanging like this. That bridle is made out of iron and about six inches across and that is liable to catch into anything.

Q. You were not there at all, were you? A. No, sir.

Q. And this is what you think might have happened? A. I inquired into the thing the following morning and that is what was reported to me the way the thing happened.

The COURT: That last statement is not evidence, it will have to be stricken out.

Mr. DUFFY: I do not think it ought to be stricken out, it is in answer to a question by Mr. Semmes.

(160) The COURT: In the first instance I am to read the testimony and decide the case and in the second instance no where is it in the law that Mr. Bartholl shall hear the testimony of another person and then decide what happened.

Mr. DUFFY: But my point is that when counsel brings out a question and the question is responsive he cannot have it stricken out.

The COURT: It is part of legitimate cross examination to ask him whether that is his opinion founded on his knowledge, but when he says it is not founded either upon his opinion or his knowledge but upon his judgment of what other people told him, it is scarcely responsive because it would substitute the witness for the court.

(Argument followed.)

The WITNESS: This net is an idea of Mr. Holiday's who used to be stevedore long ago.

Q. (By Mr. SEMMES) This same kind of sling, then, is not used by anybody else? A. No, sir, nobody else uses this kind of sling for taking in copper.

(161) Mr. DUFFY: How long have you been using it?

The WITNESS: Fifteen years or more.

Mr. DUFFY: How long has it been used down there?

The WITNESS: Fifteen years and more. I have been in Canton for seventeen years and it was in use in Canton then.

Mr. DUFFY: And you do not know how much longer than seventeen years it has been in use?

The WITNESS: No, sir, I could not tell you how much longer.

Mr. BOWEN: May it please your Honor, I asked a question yesterday which was ruled out by I think it is now proper since the respondents have asked this question on the stand whether they ever had any accidents before of this character by not using bolts.

Q. (By Mr. BOWEN) I will ask you whether you do not bolt those hatches down when you are loading and unloading a ship?

Mr. ROBINSON: That is objected to. I asked him if he ever had a net catch into a cross-beam.

The COURT: It seems to me quite clearly that they ought to have done it before, so far as that is concerned. I sustain the objection.

RE-DIRECT EXAMINATION.

(162) Mr. ROBINSON: We are going to make another effort, may it please your Honor, to get into the record a description of this net because under the view that your Honor takes of the case, as I understand it, we ought to close the case now and not bring the net up here on Monday. I also understand from your Honor that we will not be allowed to file a photograph in connection with this description.

The COURT: If I should settle the case before the photograph is in there would not be much use in filing it.

Mr. ROBINSON: I thought your Honor was going to hear from the case in Richmond.

The COURT: No, sir, I am going to decide the case unless you enter your appeal or not, as you wish.

Mr. ROBINSON: Will your Honor keep this case under advisement until we can get the bridge up here on Monday and

then we will file the bridle together with the iron with your Honor so that you can see, and then if the case goes up we will (163) take the bridle and iron down to Richmond?

The COURT: All right, I will keep the case under advisement. But the difficulty is this, Mr. Robinson, that these other gentlemen might want to prove that that is not the bridle used on that occasion, or is not similar to that one used on that occasion. I think the evidence had better be closed now. You can readily see that I cannot rule that the bridle you produce here, if they choose to challenge it, is the bridle that was used on the occasion of this accident, of the same kind of a bridle.

Q. (By Mr. ROBINSON) I understand that you said that this net was about four feet square? A. About four feet six inches or about that.

Q. I now show you this sheet of foolscap paper which is folded in the middle, both top and bottom edges being brought together; we will now assume that there are two iron— A. If you will give me a piece of string I can fix that up and give you an idea of exactly how it works.

(Witness takes string and paper and makes rough model for demonstration.)

We will suppose that this is the net. This part is made (164) fast in here and the other part is made fast over here. Now that is the way the net is made. There is a bridle that goes all around this net that this bridle here goes through. When that draws up there is a kind of round krinklet here that the bridle goes through, one on each corner.

Mr. SEMMES: That is not complete, then?

The WITNESS: No, sir, that is not complete because it has not the krinklet.

Mr. SEMMES: That does not represent it, then?

The WITNESS: It represents how the net is made outside of the krinklet. It has a piece of round iron on it that this rope rides through.

Q. (By Mr. ROBINSON) And each bridle goes through one of those rings? A. Yes, each bridle goes through a ring.

Q. Are those strings called the bridle? A. They are the rope bridle, and in addition to that on the top is an iron shackle

the shape of a "U," and that has an eye on each end that each one of these travels through and this iron bridles get hooked into the hooks. It would be hard matter for me to show you how the thing was constructed with this piece of paper.

(165) Mr. SEMMES: Then I object to its being an exhibit because I do not think it is complete.

The COURT: As you choose, but I will be willing to allow it to go in if he thinks it illustrates anything.

Mr. SEMMES: With the *understand* that it is not a perfect illustration?

The COURT: The court above will see just what I see here.

Q. (By Mr. ROBINSON) Let us get this further description: Each one of the bridles which you have attached to this piece of paper goes through an iron ring on the corner of the net and one iron ring at each corner of the net? A. Yes.

Q. Then the two bridles, or these two red strings at each end, two red strings on each side of the net, would go through a "U" shaped iron shackle? A. Yes.

Q. Which in turn is hooked on to the hook, is that right? A. Yes. This is a ring here and this will go through one eye and the other part will go through the other eye and this part here gets hooked onto the hook.

(166) Q. The top of the shackle goes onto the hook? A. Yes.

Q. Now, then, if you take each one of these red strings, taking two on each side of this paper, the two on each side would go through the eye of an iron shackle which is U-shaped? A. Yes.

Q. The shackle being U-shaped. A. Yes.

Q. Then those two shackles come together and are put on the hook? A. Yes.

Mr. SEMMES: Are there two shackles?

The WITNESS: Yes, one for each two parts.

Mr. SEMMES: Two U-shaped pieces of iron?

The WITNESS: Yes.

Q. (By Mr. ROBINSON) Then when those are put on the hook that brings the net, if it is empty, up into a folded position? A. That is the idea exactly.

Q. It collapses the net? A. Yes, closes the net up like a book.

(167) Mr. ROBINSON: We filed that as an exhibit.

(The model made by the witness out of foolscap paper and the red tape was then filed with the court as an exhibit.)

RE-CROSS EXAMINATION.

By Mr. SEMMES:

Q. Are these red strings what you refer to as the bridles?
A. We designate the whole business a bridle, in fact we call them rope bridles or iron bridles.

The COURT: What I understand you to mean by saying that this accident could not have happened if he had hooked it on according to your theory is that the accident happened by his failure to put one of those U-shaped pieces of iron on the hooks?

The WITNESS: That is the idea exactly; he hooked the one bridle on—

The COURT: We all understand that that is your theory of what he did.

A. Yes, and that is the only way it could have happened because when this comes up that hook is pretty heavy, I suppose they weigh about fifteen pounds apiece. They are made (16S) out of heavy iron, and we take as high as a ton and a half or two tons of copper to a load, and when this fills up it fills up like that and this bridle hangs down like that.

Q. (By Mr. SEMMES) When you put those bridles together the net is collapsed? A. The ends are in that shape and then they close up close; that mat inside closes up close.

Q. Do you mean closes up like that? (Indicating?) A. No, sir, not as tight as that, but it could never hook on to anything.

Q. Wouldn't there be a wide space at the end? A. Not wide enough to hook on a socket.

Q. Do they fold up so close as to leave no opening between the sides of the net? A. Yes, they close up that close that there would be no possibility of that.

Q. Or no possibility of anything catching on the rings on the nets here? A. No, sir.

The COURT: I think you said when folded together it was about a foot wide?

(169) The WITNESS: Yes, but when these nets lay flat on the deck the nets sit that high themselves. (Indicating about six inches.) The mat itself is about that thick. (Indicating three inches.)

Mr. BOWEN: Do you mean each mat or both mats together?

The WITNESS: Each mat.

Q. (By Mr. BOWEN) There is a mat on top $2\frac{1}{2}$ inches and a mat underneath $2\frac{1}{2}$ inches? A. Yes.

The COURT: I think I understand that.

Q. (By Mr. SEMMES) The iron rings are on the corners? A. Yes, one on each corner.

Q. And that forms a corner, doesn't it? A. Yes, that makes it draw when the copper is in it.

Q. Even if it is true that this net is folded so squarely as not to leave any open space there sufficient to catch, there are still two corners with iron rings on them, are there not? A. Yes, but when that bridle draws it draws those corners in so that there is no possibility of its catching.

(Testimony of witness concluded.)

(170) Mr. ROBINSON: That is the defendant's case.

(No rebuttal testimony.)

(Motion to dismiss libel against the owners of the ship granted by the court.)

DECREE DISMISSING LIBEL AGAINST THE HAMBURG-AMERICAN STEAM PACKET COMPANY.

(171) Filed June 2, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frank Imbrovek

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdirek, Master of the S. S.
"Pretoria," and Atlantic Transport
Company of West Virginia, a body cor-
porate.

(In Admiralty.)

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, and it appearing to the court that the libellant has no cause of action against the Hamburg-Amerikanische Packet Fahrt Actien Gesellschaft, herein sued as Hamburg-American Steam Packet Company, for the injuries alleged in the libel;

It is now ordered, adjudged and decreed by the court this 2nd day of June, 1911, that the libel as against above mentioned respondent be dismissed with costs to be taxed against the libellant, and on motion of the proctors for the defendant, Hamburg-American Steam Packet Company;

It is further *order* that unless an appeal be taken from this decree within the time limited by law and prescribed by the rules of this court, the stipulation filed for the release of the vessel attached in these proceedings, namely, the Steamship "Patricia" be, and the same is, hereby cancelled.

JOHN C. ROSE.

District Judge.

**OPINION OF THE COURT IN THE TWO CASES OF FRANK
IMBROVEK vs. THE HAMBURG-AMERICAN STEAM
PACKET COMPANY ET AL. AND STATE OF
MARYLAND, TO THE USE OF MARY
SZCZESEK ET AL., vs. THE HAM-
BURG-AMERICAN STEAM
PACKET COMPANY ET
AL. WHICH WERE
TRIED TO-
GETHER.**

(172) Filed June 27, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frank Imbrovek

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdirek, Master of the S. S.
Pretoria, and The Atlantic Transport
Company, a body corporate.

ROSE, District Judge:

This is a libel to recover for personal injuries. The libellant is a stevedore. He was injured in the lower hold of the Pretoria. It belonged to the respondent, the Hamburg-American Steam Packet Company. The Pretoria, its master and its owner will all be called the ship. The libellant was working under hatch No. 4. This hatch was when fully uncovered about 30 feet long and 16 wide. The covers were in three sections, the fore, the middle and the after. The covers had been taken off the middle section. They had been left on the other two. The coverings of the middle section had been piled on top of the fore and after sections. The division of the hatch into sections is made by two movable iron cross-beams, placed athwart the ship. From each cross-beam to the other and from each to the hatch combing opposite ran timbers. They are placed lengthwise of the ship. They are called the fore and afters. On these the hatch covers rest.

The libellant and his companions were in the employ of
(173) the respondent, the Atlantic Transport Company. It

will be called the stevedore. The gang were loading and stowing copper. On the dock the copper was piled on a heavy, flat, rope mat. The mat had a bridle on each of two sides. One end of each of these bridles was made fast to a corner of the mat. The bridle passes through a U-shaped iron shackle. These two shackles are placed over a hook at the end of the fall attached to the boom. The mat and contents are lifted by the winch, swung over the hatch and lowered into the hold. The mat is unhooked. The copper is taken out. The shackles are again placed in the hook. The winchman is signaled. The mat is hauled up. On one of its trips up the mat caught under the after cross-beam. The latter was instantly jerked out of its supports. It, the fore and afters resting on it, and the hatch covers supported by them, together with such of the coverings of the middle section of the hatch as had been piled on the after section, fell into the hold. The wood and iron which came down weighed nearly two tons. The libellant was struck. His skull was broken.

There would have been no accident had the entire hatch been uncovered. To uncover a hatch takes time and labor. If bad weather comes it must be covered. Unnecessary uncovering is to be avoided. It is easy to make a partially covered hatch absolutely safe. The cross-beams of the hatch have holes in their ends. There are corresponding holes in the hatch combings. Pins can be put through these holes. It takes about five minutes to put them in. When in place an accident such as gave rise to this case cannot happen. The ship's carpenter of the Pretoria keeps the pins when not in use.

Accidents often happen because an opened hatch has been left unguarded or because the hatch coverings fall into the hold. When they do there is usually a dispute as to whether the ship or the stevedore is to blame. In the case at bar the ship and the stevedore were represented by the same proctors and by the same advocates. The stevedore acquits the ship. The libellant and his mates are foreigners. Most of them speak little or no English. He offered no testimony as to the division of (174) responsibility between ship and stevedore. The stevedore proved that when the ship came into port it took complete charge of the hatches. It uncovered so much of them as it saw fit. If the pins were in and it wanted them out it took them out. It laid them on the deck. The ship's carpenter gathered them up. If the pins were out and it wanted them in it told the ship's carpenter. He put them in.

At the close of the testimony the libel as against the captain and the owner of the ship was necessarily dismissed. The court of its own motion called the attention of the advocates

of the respective parties to *Campbell vs. Hackfeld*, 125 Fed., 696. In that case the Circuit Court of Appeals for the Ninth Circuit held that admiralty had no jurisdiction to award damages to the employee of a stevedore for injuries received in consequence of the negligence of his employer. It made no difference that the tort was committed on navigable waters. In the case before me one of libellant's fellow workmen had been killed in the same accident. A libel to recover for his widow and children compensation for his death was by agreement tried with this. When the testimony closed the jurisdiction of this court was still unchallenged. It might have been assailed in the Appellate Court or denied by that court of its own motion. It would then be too late to sue at law. It seemed to be the duty of the court to bring the question of jurisdiction to the notice of the advocates of the libellants. They decided to stand by their libels.

The advocates for the stevedore asked leave to amend its answer. Leave was granted. The amendment disputes the jurisdiction of the court.

As the case stands on the pleadings and proofs the libellant must show—

(1) That he was injured by the negligence of the respondent;

(2) That the Court of Admiralty has jurisdiction;

(3) That his injuries did not result from the negligence of his fellow-servants.

(175) Neither of the two last named defenses would have been open to the ship, if the testimony had shown that it and not the stevedore had charge of uncovering the hatches or of making secure the coverings left in place.

The question of jurisdiction must first be considered. *Campbell vs. Hackfeld* was decided in October, 1903. More than four years earlier the same question was raised in this court in the case of *Dombroska vs. Westoll*. At least one thorough and learned brief was submitted and is still on file among the papers in the case. That eminent admiralty lawyer, Judge Morris, had no difficulty in disposing of the point. In view of the language of the Supreme Court and of the inferior admiralty courts and of the expressions of the text-writers, he appears to have thought the jurisdiction too clear for dispute. He accordingly overruled the exception of the respondent without writing an opinion. In spite of this earlier decision in this court, it might well be its duty now to conform its rulings

to those of the Circuit Court of Appeals of the Ninth Circuit. It is true that the decisions of that court are not technically binding here. Nevertheless they should be followed, unless after full consideration they appear to be in conflict with principles clearly settled by the decisions of the Supreme Court or of the Court of Appeals of this circuit.

The Supreme Court has said "Every species of tort, however occurring and whether on board a vessel or not, if upon the high seas or navigable waters is of admiralty cognizance."

The *Plymouth*, 3 Wallace, 637.

This language was used forty-five years ago. The Supreme Court has never intimated any dissatisfaction with it.

In the *Blackheath*, 195 U. S., 368, Justice Brown, in concurring with the conclusions of the majority of the court, said he understood that the *Plymouth* was overruled in so far as it decided that the admiralty had no jurisdiction over injuries done by ships to structures on shore. He assumed that in (176) future the English statutory rule that admiralty had jurisdiction of any claims for damages by any ship would prevail. If he had been right it would not have followed that the admiralty would not still have had jurisdiction over all torts committed upon navigable water, irrespective of the relation borne by the wrong-doer to a ship. It would, however, have given an opportunity to argue that as the rule as to locality had not been held always binding, another would have to be found. Such rule might then have been sought in the nature of the tort and the relation which it bore to the ship and its navigation. It turned out that the Supreme Court had not taken the step which Justice Brown supposed it had.

In the *Cleveland Terminal vs. Steamship Co.*, 208 U. S., 317, the court expressly decided that it would follow the *Plymouth*.

The admiralty, therefore, has no cognizance of any tort, however maritime its nature, unless it becomes effective on navigable water. The jurisdiction over torts depends on locality and not on the nature or origin of the wrong done.

That the language of the Supreme Court in the *Plymouth* literally understood was broad enough to cover the tort in controversy in the case of *Campbell vs. Hackfeld* was admitted. The Circuit Court of Appeals however said that it could not be so understood because if it was it would lead much farther than the Supreme Court could possibly have intended to go. It said "we think it would surprise the Supreme Court to be told" that admiralty had cognizance of the tort committed when *Laura D. Fair* on board the ferry steamer *El Capitan* on a voyage from Oakland to San Francisco shot *A. P. Crittenden*.

There is much reason to suppose that the Supreme Court has repeatedly implied, and sometimes apparently decided, that such a tort as that mentioned is within the jurisdiction of the admiralty. If the Circuit Court of Appeals for the Ninth Circuit is right, the power of Congress to provide for the punishment of offenses committed on navigable waters, other than the high seas, is much more limited than either Congress or the Supreme Court appear ever to have supposed.

(177) The Constitution, Art. 1, Sec. 8, Cl. 10, confers upon Congress the power to define and punish piracies and felonies committed on the high seas. The high seas are the open waters outside the portion surrounded or enclosed between narrow headlands or promontories and without the body of a county of those seas which are in fact free to the navigation of all nations and people on their borders. Within this definition are included the waters of the Great Lakes.

United States *vs.* Rodgers, 150 U. S., 255.

Within such seas may be included an open roadstead within a marine league of the shore, but at which vessels can safely ride at anchor only in those seasons in which the wind invariably blows from one direction.

United States *vs.* Brailsford, 5 Wheaton, 184.

The right of Congress to define and punish felonies on such waters is entirely independent of any powers which it may derive from the declaration of the Constitution, Art. 3, Sec. 2, Cl. 1, that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. But it is that clause which gives Congress any power which it may possess to provide for the punishment of offenses committed upon any navigable waters other than those of the high seas.

Congress has always assumed that it had such power. In the first crimes Act passed in 1790 punishment was provided for the crime of manslaughter when committed on the high seas; and for murder when committed either on the high seas or in any river, haven, basin, or bay outside of the jurisdiction of any particular State. The Supreme Court decided that the particular State intended was a State of the American Union and not a foreign country.

United States *vs.* Brailsford (*supra*).

It held that a navigable tidal river in China was not a part of the "high seas." It followed that a person might not lawfully be convicted of manslaughter committed on an Ameri-

can ship on such a river because Congress had not seen fit to attempt to publish it.

(178) *United States vs. Wiltberger*, 5 Wheaton, 76.

Justice Story on Circuit held that a land-locked bay in the Bermudas was not a part of the high seas.

United States vs. Robinson, 4 Mason, 307; 27 Fed. Cases, 871; No. 16176.

He made a similar ruling as to outer Boston Bay.

United States vs. Grush, 5 Mason, 290; 26 Fed. Cases, 48; No. 15268.

Chief Justice Marshall who in *U. S. vs. Wiltberger, supra*, spoke for a unanimous court, did not doubt the power of Congress to legislate on the subject. He pointed out that it had not seen fit to do so. Until it acted the courts could not. He assumed throughout that the sections of the Statute which provided for the punishment of murder on waters which were not part of the high seas was clearly constitutional.

In the previous case of the *United States vs. Bevans*, 3 Wheaton, 336, the prisoner had been charged with murder on an American ship in Boston Bay, within the jurisdiction of the State of Massachusetts. The Supreme Court, through Chief Justice Marshall, there said that assuming the right of Congress under the admiralty clause to provide punishment for offenses committed on navigable waters whether within or without the jurisdiction of a particular state, Congress had not seen fit to exercise its right. The question was discussed purely as one which turned on what Congress had done.

After the decision in *United States vs. Wiltberger (supra)*, the Crimes Act was redrafted by Justice Story. He made it apply throughout not only to the high seas but to any arm of the sea or to any river, haven, creek, basin or bay if within the admiralty jurisdiction and without the jurisdiction of any particular State.

In the case of the *United States vs. Grush (supra)* he expressly said that the admiralty jurisdiction extended over all arms of the sea, that is over all tidal waters. The States had concurrent jurisdiction over such of them as were within the body of a county. Congress had wisely refrained from legis-
(179) lating as to offenses which could be more conveniently disposed of in the State courts.

From that day to this eminent judges and courts have said the same thing; as, for example, Mr. Justice Nelson and

Judge Betts, in *United States vs. Wilson*, decided in 1856; 3 Blatchf., 434; 28 Fed. Cases, 718; No. 16731;

Judge Wilkins in *Miller's case* (1867), *Brown's Admiralty*, 156, 17 Fed. Cases, 300; No. 9558.

From time to time Congress had exercised in part, although always sparingly, the power it has thus been told it has.

In *United States vs. Rodgers*, 150 U. S., 255, the prisoner was charged with doing precisely what Laura Fair did, that is make an assault with a deadly weapon. The only difference was that she shot Crittenden on waters within the jurisdiction of the State of California. Rodgers made his assault upon that part of the Detroit River which is within the jurisdiction of the Dominion of Canada and therefore without that of any State of the Union. The Detroit River was admittedly not a part of the high seas in any sense of those words. Congress could not legislate as to it under its power to punish felonies on the high seas. No statute made an assault with a deadly weapon punishable when committed on the Detroit River unless it was a river connected with the high seas. The question before the court was whether the Great Lakes were high seas. If they were Congress had exercised so much of the power resulting from the admiralty clause of the Constitution as was necessary to punish the offense. Otherwise not. The court held that the Great Lakes were high seas. Justices Gray and Brown dissented. They did not question the power of Congress to punish crimes committed on navigable waters. They said Congress had not done so. Justice Brown declared "I have no doubt whatever of the power of Congress to extend its jurisdiction to crimes committed upon navigable waters."

After the case had been tried below and before it was heard above Congress provided for the punishment of various crimes when committed upon any vessel registered, licensed or (180) enrolled under the laws of the United States and being on a voyage upon the waters of any of the Great Lakes or any of the waters connecting any of said lakes. The Straits of Mackinaw connect Lakes Michigan and Huron. They are within the State of Michigan as much as the Bay of San Francisco is within the State of California. If Congress has the power to provide for the punishment of offenses committed upon the Straits of Mackinaw it has like power when they are committed upon any other navigable water of the United States.

The text-writers all say or assume that Congress has such power. As an illustration see one of the earliest and one of the latest—

2 Story on the Constitution, Secs. 1665 and 1669;

2 Willoughby on the Constitution, Sec. 646-647.

Nowhere has it been suggested that this power to punish crimes is limited to persons or offenses who or which bear any special relation to the ship upon which the deed is done.

Congress may make all crimes committed in places within the admiralty jurisdiction punishable in the Federal Courts. It never has provided for the punishment therein of more than an insignificant proportion. It may safely be assumed that it never will.

It has, however, given the District Courts cognizance of *all* civil cases of admiralty and maritime jurisdiction. It follows that those courts on the civil side have now jurisdiction over all wrongs committed upon waters over which Congress could by virtue of the admiralty clause of the Constitution authorize the exercise of criminal jurisdiction.

One text-writer suggests that the civil jurisdiction of courts of admiralty now in matters of tort is less extensive than the potential jurisdiction of Congress over crimes appears to be.

Benedict on Admiralty, after stating the rule in the usual form, adds—

“It may, however, be doubted whether the civil jurisdiction, in such cases of torts, does not depend upon the relation of the parties to a ship or vessel, embracing only those tortious violations of maritime right and duty which occur, in vessels, to which the admiralty jurisdiction, in cases of contracts applies. If one of several landsmen bathing in the sea should assault or imprison or rob another, it has not been held here that the admiralty would have jurisdiction of the action for the tort.”

(181) Benedict's Admiralty (3 ed.), Sec. 308.

The point is not further argued. The rule by which the civil jurisdiction may be confined in narrower limits than that over which the criminal jurisdiction extends is not stated. The case supposed of one landsman robbing another while bathing is an extreme one. It is not likely that Courts of Admiralty will ever be troubled with many suits to recover damages for such injuries. Plaintiffs are more likely to seek smart money from a jury. If a case of that nature once in a while found its way into a Court of Admiralty, no great harm would be done. Unnecessarily to introduce into simple and easily understood rules of jurisdiction, exceptions that in their nature are hard to define accurately, is always costly. Mistakes as to whether jurisdiction does or does not exist inevitably cause denials of justice.

Such a case as that which Benedict gives as an illustration of a tort not cognizable in the admiralty, has no connection whatever with a ship, not even that of locality. It may perhaps be that a tort committed on navigable waters but not on a ship and not connected with a ship, or in any direct way affecting a ship, may not be redressed in the admiralty. Such, however, is not the case at bar. The tort complained of occurred on navigable waters and on board of a ship. The parties to it were engaged at the time in work absolutely essential to the business of the ship in navigating the seas. The tort alleged is the failure of one of them to use due care in protecting the other from the dangers of that work. It would seem that such a tort is clearly maritime. If maritime it is in any event and under any general theory of jurisdiction within the cognizance of a Court of Admiralty.

If the custom of the port had required the ship's carpenter to put in the pins of his own motion there would be no doubt that the libellant could have redress in the admiralty. It would be hard to explain to any layman why he could not merely because the ship's carpenter was not expected to put in the pins until the boss stevedore told him to do so. There are arbitrary distinctions in all departments of the law. There always will be. There are some in the admiralty. There (182) is no reason to add unnecessarily to their number. The contract of the stevedore with the ship is unquestionably maritime.

Norwegian S. S. Co. *vs.* Washington, 57 Fed., 224; C. C. A., 5 Cir.;

The Maine, 51 Fed., 954, C. C. A., 5 Cir.;

The John Shay, 81 Fed., 216.

If the Supreme Court and many other American Courts and text-writers have been in error in saying that admiralty has jurisdiction over torts of whatever nature when committed on navigable waters, as the Circuit Court of Appeals for the Ninth Circuit thinks, it does not follow that admiralty has not jurisdiction over the case at bar.

The particular tort here complained of is maritime within any but the narrowest definition of that term.

It appears to be true, as the Circuit Court of Appeals for the Ninth Circuit points out, that there are no cases in the books of recoveries or attempted recoveries in admiralty by working stevedores against boss stevedores for injuries suffered in the course of their work on shipboard in consequence of the negligence of their employers. The circumstance is not without its weight. It must be borne in mind, however, that when the boss stevedore was pecuniarily worth suing he could be

conveniently sued in the State courts. Most lawyers who make a speciality of personal injury cases prefer to try them before juries. There may be a number of cases in the District courts, as there has been at least one in Maryland, in which the jurisdiction seemed to the judge so clear as not to justify an opinion.

The Circuit Court of Appeals for the Ninth Circuit relies largely on the opinion of Lord Esher in *Reg. vs. The Judge of the City of London Court*, L. R., 1 Q. B. Div., 1892, 273. It is an able and learned deliverance. The statute and precedents of the English admiralty with which he was concerned are markedly different from the accepted doctrines of our Courts of Admiralty. Much which he says is admittedly irrelevant here. He points out that American decisions on questions of the jurisdiction of admiralty are largely inapplicable there. What he decided was that admiralty has no jurisdiction to entertain (183) a libel against a pilot for damages resulting from his negligent handling of a ship. Such is not the law in this country.

In the case of *Donald vs. Guy*, 127 Fed., at page 228, the District Court for the Eastern District of Virginia assumed jurisdiction in admiralty over a libel filed by the owners of a steamer against one Guy and twenty-six associates who composed the Virginia Pilot Association. Guy was a licensed Virginia pilot and was in charge of the steamer at the time it came into collision with a schooner. The steamer was held in fault and compelled to make good to the schooner its damage. It was alleged that the negligence for which the steamer had been held responsible was the negligence of Guy. It was contended that the other twenty-six members of the Virginia Pilot Association were his partners in the business of pilotage and were jointly liable with him. The question was greatly discussed as to whether the twenty-six pilots, who were not themselves negligent, were liable. The District Court reached the conclusion that they were.

See also the same case, 135 Fed., 429.

When the case came to the Circuit Court of Appeals for the Fourth Circuit it certified the question as to whether the other twenty-six pilots were or were not liable to the Supreme Court of the United States. That Court in *Guy vs. Donald*, 203 U. S., at page 399, held that they were not.

Not once anywhere in any of the three courts through which the case passed does it appear that anyone raised the question of jurisdiction. It seemed to the able admiralty lawyers employed in that case, and to the experienced judges who heard it, too clear for question.

Nor did the question of jurisdiction suggest itself to the Circuit Court of Appeals for the Third Circuit in the case of the City of Dundee, 108 Fed., 679.

All the above mentioned courts took it for granted that a libel *in personam* would lie against a pilot who was personally negligent in navigating a ship to recover for the injury resulting from such negligence.

The earliest of these cases was decided a number of years after Lord Esher's opinion was published. Most of them were subsequent to the case of Campbell vs. Hackfeld.

For the reasons above stated, the objection of the respondent to the jurisdiction will be overruled.

Was the libellant injured as a result of the negligence of the stevedore or of its agents or servants? If the pins had been in he would not have been hurt. As I saw and heard the evidence I was convinced that so soon as the accident happened every one except the laborers themselves thought of the pins. The promptness with which they came into everybody's mind is convincing evidence that one of their recognized uses was to render such accidents impossible.

According to the testimony of the stevedore's own witness it would not have taken more than five minutes to put them in. It was negligence to omit so simple and well understood a precaution, the possibilities of accidents otherwise being so obvious.

The fact, as testified to, that this particular stevedore had never before had a similar accident means little. No one attempted to say how often the work had been carried on under like conditions, without the pins being in place. Even if that had been frequently done it would have tended to show that the stevedore had been fortunate rather than prudent.

The stevedore says that if there was any negligence it was the negligence of a fellow-servant of the libellant, and for that it is not responsible. It admits that the duty to provide a safe place in which to do the work is one which cannot be delegated, but it points out that the duty is one of construction or provision and not of operation. It says that the pins were provided. If they were not used it was the fault of the gang boss. The gang boss, it says, was a fellow-servant of the libellant. It does not seem important to determine whether he was or was not. In view of the complete control of the work which he was allowed to exercise if he chose, of his (185) power to employ and discharge the men under him, of the lack of any attempt at supervision over him, it seems probable that he was a vice-principal. It is not necessary so to decide. The stevedore was bound to use due diligence to see that the libellant had a safe place in which to work. If it had issued orders to its foremen or gang bosses that they were

not to allow the men to work under partly covered hatches unless the pins were in, then if those instructions were disobeyed the negligence would be the negligence of the gang boss. If the gang boss was the fellow-servant of the libellant, the latter might not be entitled to recover. There is no evidence that any such orders, whether general or special, were ever issued. The stevedore's sole witness, Bartholl, appears to have had entire charge of the work of loading and unloading. He at least appears to have occupied the position of vice-principal. The testimony at all events does not show what other human being acted for the corporate respondent. He admits that he never concerned himself about the pins. He did not look to see whether they were in or out. He issued no orders about them. It is evident from his testimony that the stevedore did not give a thought to them. In failing so to do it neglected a duty which it owed to the libellant and his mates.

The stevedore admits in its brief that there is no question of contributory negligence in the case.

The witness Bartholl, who was not present, says that the accident never could have happened had the mat been properly hooked on. I am not satisfied that he is correct in this. It seems quite possible that there were conditions in which the mat might have caught had the shackles been properly hooked. There is no evidence that they were not, except this witness's opinion that if they had been the mat could not have pulled the cross beam out of place. Two eye-witnesses swear that the mat was hooked on. The negligence of the stevedore being established, the burden of showing that the negligence of a fellow-servant of the libellant contributed to the accident is on it. In my judgment that burden has not been sustained.

(186) The libellant was terribly injured. A triangular piece of his skull, about two or two and a half inches on each side, was crushed. The tissues and brain under it were lacerated. A part of the brain substance exuded. His life was saved. For a while there was a complete paralysis of the right side. His condition has improved somewhat. His leg and arm, however are still paralyzed to a degree to render hard physical labor impossible. It is the only kind of labor to which he ever was trained. The disinterested physicians from the public hospital to which he was taken after the accident say that the probabilities are that his right arm and leg will remain permanently as they now are. He was a strong, healthy man, forty-two years of age. He has a wife and seven children. He probably averaged earnings of about ten dollars a week. An allowance of \$4,500 to him will be moderate and reasonable. I will enter a decree in his favor against the Atlantic Transport Company for that amount.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

(187)

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, infant
children of Martin Szczesek, deceased,
vs.

In Admiralty.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdrick, Master of the S. S.
Pretoria, and The Atlantic Transport
Company, a body corporate.

ROSE, District Judge:

This is a libel filed on behalf of the widow and infant children of Martin Szczesek. The deceased was working with Frank Imbrovek, the libellant in the foregoing case. He received fatal injuries in the same accident in which Imbrovek was hurt. The cases were tried together.

For the reasons therein stated I find that his death resulted from negligence of the Atlantic Transport Company. In this case that company set up the additional defense that admiralty has no jurisdiction to enforce the Maryland form of Lord Campbell's Act. For the reasons stated in my opinion in the case of *State of Maryland to the use of Pryor, et al. vs. Miller, et al.*, 180 Fed., 796, this defense is overruled.

The deceased was forty years of age. He leaves a wife and five children, the eldest of whom is sixteen, the youngest three years. He earned about ten dollars a week. An allowance of \$4,500 to his widow and children in the aggregate would be fair and reasonable.

I will hear the proctors for the libellants further as to the proper division of this sum among the widow and children.

DECREE AGAINST THE ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA.

(188)

Filed June 28, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frank Imbrovek	}	In Admiralty.
vs.		
The Atlantic Transport Company of West Virginia, a body corporate, et al.		

DECREE.

This cause standing ready for a hearing, the witnesses being examined in the presence of the court and the proceedings read, heard and considered, and it appearing to the court that the libellant is entitled to recover from the Atlantic Transport Company of West Virginia, a body corporate, his damages resulting from the injuries sustained by him, and which damages amount to forty-five hundred dollars (\$4,500.00),

It is adjudged, ordered and decreed this 28 day of June, 1911, by the District Court of the United States for the District of Maryland that the Atlantic Transport Company of West Virginia, a body corporate, pay to the libellant, Frank Imbrovek, or his proctors, the sum of forty-five hundred dollars, with interest thereon until paid and his costs to be taxed. And it is further adjudged, ordered and decreed that unless the said Atlantic Transport Company of West Virginia within ten days from the date of this decree pay to said libellant, or his proctors, the sum hereinbefore decreed to be paid to him and the costs of his suit, execution for the enforcement of this decree may issue against the said defendant, the Atlantic Transport Company of West Virginia.

JOHN C. ROSE,
District Judge.

**PETITION OF RESPONDENT FOR APPEAL, ASSIGN-
MENT OF ERRORS AND ORDER OF COURT
THEREON ALLOWING APPEAL.**

(189)

Filed July 6, 1911.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF MARYLAND.

Frank Imbrovek
vs.
The Atlantic Transport Company of
West Virginia. }

To the Honorable John C. Rose, Judge of the United States
District Court:

The petition of the Atlantic Transport Company of West Virginia, respondent in the above entitled case, prays that it may be allowed an appeal to the Circuit Court of Appeals for the Fourth Circuit, from the decree passed in said case, bearing date the 27th day of June, 1911, and that a proper citation may be issued and served upon Frank Imbrovek, libellant in said case, or his proctors, and that the record of the proceedings in said case be transmitted to said Circuit Court of Appeals, and that the said decree be reversed, and a decree entered in favor of your petitioner, dismissing said libel with costs.

Your petitioner further prays your Honor to prescribe the amount of bond to be given on appeal.

Your petitioner files the following assignment of errors:

1. That it was error on the part of the District Court in holding that admiralty had jurisdiction of the cause of action against the stevedore.

(190) 2. That it was error on the part of the District Court in finding that there was evidence showing that one of the recognized uses of the pins was to prevent accidents such as that which happened.

3. That it was error on the part of the District Court in holding that it was negligence on the part of the stevedore to omit putting the pins in.

4. That it was error on the part of the District Court in finding that the possibility of an accident like the one in question was obvious.

5. That it was error on the part of the District Court in holding that the gang boss was a vice-principal.

6. That it was error on the part of the District Court in finding that there was any evidence to show a lack of supervision over the gang boss.

7. That it was error on the part of the District Court in holding that Barttholl was a vice-principal.

8. That it was error on the part of the District Court in finding or assuming that no orders had been issued by the stevedore to its foreman or gang bosses to the effect that they were not to allow the men to work under partly covered hatches, unless the pins were in.

9. That it was error on the part of the District Court in holding that the burden of proof was on the stevedore to show that it had issued orders to its foreman or gang bosses that they were not to allow the men to work under partly covered hatches unless the pins were in.

10. That it was error on the part of the District Court in finding that the stevedore did not give a thought to the pins.

11. That it was error on the part of the District Court in holding that because the stevedore did not give a thought to the pins, it neglected a duty which it owed to the libellant.

12. That it was error on the part of the District Court in finding that the mat might have caught had the shackles been properly hooked.

13. That it was error on the part of the District Court in holding that the accident to the libellant and his consequent injury resulted from the negligence of the stevedore.

14. That it was error on the part of the District Court in holding that the burden of showing that the negligence of a fellow servant of the libellant contributed to the accident was on the respondent.

15. That it was error on the part of the District Court in holding that the accident to the libellant and his consequent injury did not happen by reason of the negligence of his co-servant.

(191) 16. That it was error on the part of the District Court in sustaining the libel of the libellant and in decreeing in his favor the sum of \$4,500.00 with interest from June 27, 1911, and the costs in said case.

17. That it was error on the part of the District Court in not decreeing in favor of this petitioner and dismissing the libel in this case.

RALPH ROBINSON,
EDW. DUFFY,
Proctors for Petitioner.

Upon the foregoing petition it is by the United States District Court for the District of Maryland.

Ordered this sixth day of July, in the year nineteen hundred and eleven, that the appeal prayed for be and the same is hereby allowed. The appeal bond for the stay of execution and for costs is fixed at the sum of six thousand dollars (\$6,000).

JOHN C. ROSE,
District Judge.

Service of copy admitted the 6th day of July, 1911.

SEMMES, BOWEN & SEMMES,
Proctors for Libellant.

APPEAL BOND.

(192)

Filed July 6th, 1911.

Know all men by these prents:

That we, the Atlantic Transport Company of West Virginia, a corporation duly incorporated under the laws of the State of West Virginia, as principal, and American Bonding Company of Baltimore, a corporation of Maryland, of Baltimore, Maryland, as surety, are held and firmly bound unto Frank Imbrovek in the full and just sum of six thousand dollars (\$6,000), to be paid to the said Frank Imbrovek, his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves and our respective successors, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of July, in the year of our Lord one thousand nine hundred and eleven.

Whereas lately at a District Court of the United States in and for the District of Maryland, in a suit depending in said court between Frank Imbrovek and the Atlantic Transport

Company, a decree was rendered against the said Atlantic Transport Company and the said Atlantic Transport Company having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Frank Imbrovek, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Fourth Circuit, *Court* to be holden at Richmond on the day in the said citation mentioned;

Now, the condition of the above obligation is such, that if the said Atlantic Transport Company shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void; (193) else to remain in full force and virtue.

In testimony whereof the aforesaid Atlantic Transport Company of West Virginia has hereto set its corporate name by hand of its president, and has hereunto affixed its corporate seal, duly attested by its secretary; and the aforesaid surety has hereto set its corporate name by hand of its president, and affixed its corporate seal, duly attested by its secretary the day and year first above written.

THE ATLANTIC TRANSPORT COMPANY
[Seal of the A. T. Co.] OF WEST VIRGINIA,
By P. A. S. FRANKLIN, President.

Attest:

J. J. McGLONE, Secretary.

AMERICAN BONDING COMPANY
[Seal of the A. B. Co.] OF BALTIMORE,
By JAS. T. WILSON,
Agent and Attorney in fact.

Attest as to surety:

JOHN G. SCOTT.

Approved—

JOHN C. ROSE,
District Judge.

CITATION.

UNITED STATES OF AMERICA, } ss.:

The President of the United States to Frank Imbrovek—
Greeting:

(194) You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the 4th day of August, next, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland in your favor passed in a cause in said court wherein the Atlantic Transport Company of West Virginia, a corporation, is respondent, and you are libellant, to show cause, if any there be, why the decree rendered against the said respondent in said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland this 6th day of July, in the year of our Lord, one thousand nine hundred and eleven.

JOHN C. ROSE,
District Judge.

Attest:

ARTHUR L. SPAMER,
Clerk of said District Court.

Service of the within citation acknowledged this 10th day of July, 1911.

SEMMES, BOWEN & SEMMES, Proctors.

ORDER TO TRANSMIT RECORD.

(195) And, thereupon, it is ordered by the court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste: ARTHUR L. SPAMER, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, }
District of Maryland, } to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things hereunto relating in the therein entitled case.

In testimony whereof, I hereunto set my hand and af-
{ Seal of } fix the seal of said District Court, this 31st day
{ Court } of July, 1911.

ARTHUR L. SPAMER, Clerk.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1058.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
FRANK IMBROVEK, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

August 4, 1911, transcript of record is filed and cause docketed. Same day, appearance of Edward Duffy for the appellant, and the appearance of W. H. Price, Jr., C. K. Mount, John E. Semmes, Jesse N. Bowen and John E. Semmes, Jr., for the appellee, entered, orders filed.

August 30, 1911, twenty copies of the printed record are filed.

December 16, 1911, (November Term, 1911,) cause is continued to the February Term, 1912, by the court.

February 8, 1912, (February Term, 1912,) cause came on to be heard before Goff and Pritchard, Circuit Judges, and Dayton, District Judge, and is argued, together with case No. 1059, by counsel, and submitted.

February 20, 1912, (Same Term) court announced and filed its opinion, which is as follows, to-wit:

Opinion.

Filed February 20, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1058.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
FRANK IMBROVEK, Appellee.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

[Argued February 8, 1912; Decided February 20, 1912.]

Before Goff and Pritchard, Circuit Judges, and Dayton, District Judge.

Ralph Robinson and Edward Duffy (Nicholas P. Bond on the Brief) for Appellant, and John E. Semmes, Jr., (John E. Semmes and Jesse N. Bowen on the Brief) for Appellee.

Per CURIAM:

We find ourselves in full accord with the views of the court below, on all questions raised by the assignments of error, 190 Fed., 229. Affirmed.

February 26, 1912, (Same Term), the court made and entered the following decree, to-wit:

Decree.

Filed and Entered February 26, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1058.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
vs.

FRANK IMBROVEK, Appellee.

Appeal from the District Court of the United States for the District of Maryland.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this case, be, and the same is hereby, affirmed, with costs.

February 26th, 1912.

NATHAN GOFF.

Petition of Appellant to Stay Mandate.

Filed March 9, 1912.

In the United States Court of Appeals for the Fourth Circuit.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

FRANK IMBROVEK.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

STATE OF MARYLAND, to the use of Mary Szczesek, Widow of Martin Szczesek, in Her Individual Capacity and as Mother and Next Friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, Infant Children of Martin Szczesek, Deceased.

To the Honorable the Judges of said Court:

The petition of the Atlantic Transport Company of West Virginia respectfully shows:

That it is about to file in the Supreme Court of the United States a petition for a writ of certiorari in the above two cases; that it served a copy of said petition for said writ of certiorari on counsel for the appellees on March 8th, 1912, giving them notice that on Monday, March 25th, 1912, at the opening of court on that day, or as soon thereafter as counsel can be heard, it will move the Supreme Court of the United States to grant the said writ of certiorari.

Wherefore your petitioner prays, that the mandates of this court in the above two cases be withheld until the Supreme Court of the United States passes on the question as to whether or not it will grant the writ of certiorari as aforesaid.

EDW. DUFFY,

Counsel for Petitioner.

STATE OF MARYLAND,

City of Baltimore, To wit:

I hereby certify that on this 8th day of March, in the year nineteen hundred and twelve, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore City aforesaid, duly commissioned and qualified, personally appeared Edward Duffy, counsel for the petitioner, and he made oath in due form of law that the matters and facts set out in the foregoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[NOTARIAL SEAL.]

EDWARD P. HILL,

Notary Public.

Order Staying Mandate.

Filed and Entered March 9, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1058.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
vs.

FRANK IMBROVEK, Appellee.

Appeal from the District Court of the United States for the District
of Maryland, at Baltimore.Upon the petition of the appellant, by its counsel, Edward
Duffy, and for good cause shown,It is ordered that the mandate of this court in the above case be,
and the same is hereby, stayed pending the application of the ap-
pellant for a writ of certiorari in the Supreme Court of the United
States, provided said application is filed in the said Supreme Court
by April 2, 1912.NATHAN GOFF,
Circuit Judge, Presiding.

March 9, 1912.

*Clerk's Certificate.*UNITED STATES OF AMERICA,
*Fourth Circuit, ss:*I, Henry T. Meloney, Clerk of the United States Circuit Court of
Appeals for the Fourth Circuit, do certify that the foregoing is a true
copy of the entire record and proceedings in the therein entitled
cause as the same remains upon the records and files of the said
Circuit Court of Appeals.In testimony whereof I hereto set my hand and affix the seal
of the said United States Circuit Court of Appeals for the Fourth
Circuit, at Richmond, on this 11th day of March, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
*Clerk of the United States Circuit Court
of Appeals, Fourth Circuit.*

In the United States Circuit Court of Appeals for the Fourth Circuit.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,

VS.

FRANK IMBROVEK, Appellee.

It is hereby stipulated and agreed that the certified transcript of the Record in the above entitled case heretofore filed in the Supreme Court of the United States may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States in the above entitled case.

EDW. DUFFY,

Proctor for Appellant.

JOHN E. SEMMES, JR.,

Proctor for Appellee.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed April 13, 1912, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of April, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

*Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.*

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA,

Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 10th day of April, 1912, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified transcript of the Record in the above entitled case heretofore filed in the Supreme Court of the United States may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States in the above entitled case.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of April, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

*Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.*

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Atlantic Transport Company of West Virginia is appellant, and Frank Imbrovek is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Maryland, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. MCKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23104. Supreme Court of the United States. No. 1028, October Term, 1911. Atlantic Transport Co. of West Virginia, vs. Frank Imbrovek. Writ of Certiorari. The Execution of the within writ appears from the schedules hereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Ct. Appeals.

[Endorsed:] File No. 23104. Supreme Court U. S., October Term, 1911. Term No. 1028. Atlantic Transport Co. of West Virginia vs. Frank Imbrovek. Writ of certiorari and return. Filed April 15, 1912.



ATLANTIC TRANSPORT COMPANY OF NEW YORK
NEW YORK

STATE OF MARYLAND TO THE USE OF MARYLAND
WIDOW OF MARYLAND

IN WITNESS WHEREOF I HAVE HEREunto
SIGNED MY HAND AND SEAL OF OFFICE

ATTEST
NOTARY PUBLIC

1911

(23,105)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1029

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA,
PETITIONER,

vs.

STATE OF MARYLAND, TO THE USE OF MARY SZCZESEK,
WIDOW OF MARTIN SZCZESEK, &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

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TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA, }
DISTRICT OF MARYLAND, } To-wit:

At a District Court of the United States in and for the Maryland District, begun and held at the City of Baltimore on the first Tuesday in June, (being the sixth day of the same month), in the year of our Lord one thousand nine hundred and eleven.

Present: The Honorable Thomas J. Morris, Judge Maryland District; John C. Rose, Judge Maryland District; John Philip Hill, Esq., Attorney; George W. Padgett, Esq., Marshal; Arthur L. Spamer, Clerk.

Among others were the following proceedings, to-wit:

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antonie, infant children of Mar-
tin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation; Cap-
tain H. Meyerdirck, Master of the S. S.
"Pretoria," and the Lorant Stevedore
Company, a body corporate.

In Admiralty.

LIBEL.

(2) Filed November 22, 1910.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antonie, infant children of Mar-
tin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation; Cap-
tain H. Meyerdirck, Master of the S. S.
"Pretoria," and the Lorant Stevedore
Company, a body corporate.

In Admiralty.

To the Honorables Thomas J. Morris and John C. Rose,
Judges of the United States District Court for the Dis-
trict of Maryland:

(3) The libel and complaint of the State of Maryland, for the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased, residents of the city of Baltimore, in the State of Maryland, against the Hamburg-American Steam Packet Company, a foreign corporation, incorporated under the laws of the Kingdom of Germany; Captain H. Meyerdirck, Master of the S. S. "Pretoria," a non-resident of the District of Maryland, and the Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland, in a cause of damages, civil and maritime, alleges as follows:

First. That at the time of the happening of the wrongs and injuries hereinafter complained of the said Hamburg-American Steam Packet Company was and still is the owner of the S. S. "Pretoria," and that Captain H. Meyerdirck was and still is the Master of the said S. S. "Pretoria." The said S. S. "Pretoria" is not now within the jurisdiction of this Honorable Court.

Second. That heretofore, to-wit, on the 22nd day of August, 1910, the said S. S. "Pretoria" was lying in the Port

of Baltimore, at the dock of the Atlantic Transport Company in said port, for the purposes of loading her cargo at the said port.

Third. That Martin Szczesek, the deceased husband, and father of the equitable libellants had been regularly employed by the respondent, the Lorant Stevedore Company, as a stevedore to assist in loading the said steamship at the said Atlantic Transport Company's pier; that he was one of several stevedores working on said date in assisting to load said steamship's cargo.

(4) Fourth. That on or about August 22nd, 1910, at about 10 o'clock at night, Martin Szczesek, deceased, in the regular course of his duties and employment as such stevedore, was in the hold of said vessel assisting in the loading of its cargo, consisting of copper ingots, said cargo being put into the hold of said steamship as follows:

That on the main deck of said steamship, a short distance in front of the fore hatch, were two masts, to which were attached, near their respective bases, booms, which could be lowered or raised so as to place any load being lifted or lowered thereby over the side of the steamship or into the hatch.

That these booms were equipped with cables or ropes, blocks and necessary tackle used in raising or lowering loads to or from the vessel; that the tackle from these booms were shackled together, one boom being placed over the side of the vessel to raise the load from the scow alongside of said steamship, and the other boom being placed directly over the fore hatch of said steamship.

That the copper ingots would be placed in a net sling and raised to a height above the side of the vessel; the cable on that boom would be slackened, and the cable on the boom over the hatchway would then be taken in and the net sling would in this manner be carried over the hatch opening, the two booms remaining stationary; the net sling would then be lowered through the hatch into the hold of the vessel, where the deceased, Martin Szczesek, with other stevedores employed with him, would unhook the said net sling and carry the copper ingots from it and store them in the hold of said steamship, and

(5) as these net slings were unloaded they would be attached to the tackle and raised out of the hold of the vessel through the hatch and over the side and lowered into the scow to be filled and returned to the hold of the steamship.

Fifth. That at the time the cargo was being received they were working through the center section of the forward hatchway, on the lowest or bottom deck of the steamship, the fore

section and aft section of this hatch having been left in place, which allowed an opening of about eight feet through which to raise and lower the tackle and sling.

Sixth. That just before the accident alleged a net sling, loaded with copper ingots, had been lowered into the hold of the vessel and had been unhooked from the tackle and the empty sling had been attached thereto; that a deckman standing on the upper deck gave a signal to the engineer operating the tackle to hoist; that the machinery was started, and the net sling on its way up from the hold of said steamship caught on the middle fore and aft socket of the cross beam of the aft section of the hatch and raised said hatch out of its supports, from which it dropped into the hold of the vessel, a distance of, approximately eighteen or twenty feet, upon Martin Szczesek, deceased, and other employees of the Lorant Stevedore Company working in said hold, before the said deceased had an opportunity or chance to get away from under said falling section of the hatch and while the said Martin Szczesek, deceased, was working in the usual, necessary and ordinary location and manner and was exercising due care and caution and was not guilty of any negligence contributing to said accident, and that the said accident was due to the negligence and carelessness of the respondents and their agents in the following particulars:

A. In the failure of the respondents to bolt the hatches left in position during the loading of said steamship—for which provision was made in the construction of the said (6) hatches—to the coamings of the hatchway; that the beams in the construction of the hatches have holes corresponding with holes in the sockets in the coamings, through which bolts were intended to be placed, and thus securing the hatches; and that the hatch which fell was not bolted, as alleged.

B. In failing to provide a sufficient opening through the hatchway, through which the net sling was lowered and raised.

C. In negligently using the two derricks aforesaid with tackle shackled together while hoisting or lowering the said net slings through the limited and insufficient opening in the hatchway.

D. In negligently adjusting the position and setting of the boom of the derrick over the hatchway, thereby causing the net sling and tackle to pass too close to the cross beams of said aft section of the forward hatch.

E. In negligently raising the tackle and empty sling from the hold of the vessel at a very rapid rate of speed.

Seventh. Your equitable libellants say that, in consequence of the falling of said aft section of the forward hatch upon the said Martin Szczesek, deceased, he received serious injuries, from which he died about one hour later, as a direct result of said injuries.

Eighth. Your equitable libellants say that it was necessary for said Martin Szczesek to go into the hold of said vessel and come under the opening in said hatchway, and that he had no warning whatever that said opening was insufficient, and that said aft section of the hatch was, therefore, in a defective and dangerous condition, nor could he have known of the dangerous and unsafe condition of said hatchway by the exercise of ordinary care on his part, but that the respondents, the said Hamburg-American Steam Packet Company, Captain H. Meyerdirek, and the Lorant Stevedore Company well knew, or could have known of the insufficient space in said hatchway, of the unsafe and dangerous condition of said hatches, and of the improper placing of the boom over the hatchway, as alleged.

(7)

Ninth. Your equitable libellants say that the respondents failed to provide a reasonably safe and proper place in which the deceased husband and father of these equitable libellants was to work as such stevedore, and by the negligence and carelessness of said respondents the said deceased was exposed to risk and hazard which his employment did not contemplate, and of which he had no warning, and that the said accident was not the result of negligence or want of care on the part of the said deceased, Martin Szczesek, directly thereunto contributing, but was the result of the negligence of the said respondents, as hereinbefore alleged. And for the purpose of recovering damages for said injuries resulting in the death of the said Martin Szczesek, these equitable libellants bring this suit and claim damages to the extent of twenty-five thousand dollars (\$25,000.00).

Tenth. Your equitable libellants are very poor, and, because of their poverty, are totally unable to pay the costs of this suit or to give security therefor, and they further aver that they believe they are entitled to the redress they seek in this suit.

Eleventh. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this Honorable Court.

Wherefore, your equitable libellants pray for an order that they may be allowed to sue in *forma pauperis*, and that process of monition may issue to the Marshal of the District aforesaid, commanding him to summon the Hamburg-American Steam Packet Company, Captain H. Meyerdirek, Master of the S. S. "Pretoria," and the Lorant Stevedore Company, and that each of them may be required to appear before this Honorable Court and answer, under oath, this libel and all and singular the matters aforesaid, and that if the said Hamburg-American Steam Packet Company and Captain H. Meyerdirek, Master of the S. S. "Pretoria," cannot be found, their goods and chattels, and particularly the S. S. "Patricia," which is owned by (S) the said Hamburg-American Steam Packet Company, and which is now within this district, be attached to the amount sued for and costs; and if sufficient goods and chattels cannot be found, then that their credits and effects be attached, or that the credits and effects of either of them be attached, in the hands of the Atlantic Transport Company, or in such other bodies' corporate or persons' hands that same may be found, to the amount sued for and costs; and that they may be required to answer all and singular the matters aforesaid; and that this Honorable Court will be pleased to decree the payment of damages sustained by your equitable libellants, together with costs; and that they may have such other and further relief as in law and justice they may be entitled to receive.

SEMMES, BOWEN & SEMMES,
Proctors for Libellant.

MARY SZCZESEK.

UNITED STATES OF AMERICA, {
District of Maryland. }

Mary Szczesek, being duly sworn, made oath before me, the subscriber, a justice of the peace of the State of Maryland, in and for Baltimore City, this 21st day of November, 1910, that the allegations in the foregoing libel are true, and the libellants are entitled to the redress sought by this suit, to the best of her belief, and that owing to their poverty, they are not able to bear the expenses of this suit or to give the bond and security required, and she further makes oath that the Hamburg-American Steam Packet Company is a foreign corporation, and that Captain H. Meyerdirek is not a citizen of the United States, nor does he reside within the District of Maryland, and that neither of these respondents has an office within the District of Maryland to the best of her knowledge, and that unless the said respondent, the said Hamburg-American Steam

Packet Company's property which is now within the district be attached, she is apprehensive that they will be without redress.

Witness my hand.

C. EDW. SCHAUMLOEFFEL,
Justice of the Peace.

(9) On the foregoing libel and prayer thereof, it is ordered by the District Court of the United States for the District of Maryland this 22nd day of November, 1910:

That the libellants be allowed to sue in *forma pauperis*;

That the officers of this court shall issue and serve all processes and perform all duties in said cause without the libellants being required to prepay the fees for same or give security therefor, and

That the libellants shall have the same remedies as are provided by law in other cases, and

That the warrant of attachment prayed for in the foregoing libel be issued against the goods and chattels, credits and effects of said respondents, as prayed.

THOS. J. MORRIS,
District Judge.

BILL OF PARTICULARS.

(10) This suit is brought to recover damages for the death of the husband and father of the equitable plaintiffs, Mary Szczesek, widow, and Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of the deceased, who died from fatal injuries received on or about the 22nd day of August, 1910, while he was employed as a stevedore by The Lorant Stevedore Company, and was occupied in assisting to load the steamship "Pretoria," owned by The Hamburg-American Steam Packet Company, of which Captain H. Meyerdirek was and still is master.

The deceased was fatally injured by the falling of the aft section of the forward hatch, caused by a net sling which was being raised from the hold of the vessel being caught on the hatch, lifting it out from its supports and dropping it upon the said Martin Szczesek. That the dropping of said hatch was caused entirely by the negligence of the respondents in this case without any negligence of the deceased thereunto contributing. That the said deceased was the sole support of these libellants, and for the death of the husband and father of these equitable libellants this suit is brought, and damages claimed to the extent of \$25,000.

SUMMONS WITH CLAUSE OF FOREIGN ATTACHMENT.

(11) Issued November 22, 1910.

THE UNITED STATES OF AMERICA }
 District of Maryland, } to-wit:

The President of the United States of America to the Marshal
 for the Maryland District—Greeting:

We command you that you summon the Hamburg-American Steam Packet Company, a foreign corporation, Captain H. Meyerdirck, Master of the Steamship "Pretoria" and the Lorant Stevedore Company, a corporation, if they be found in your district, and if they or either of them, can not be so found, that you attach their goods and chattels, and particularly the Steamship "Patricia," which is owned by the said Hamburg-American Steam Packet Company, and which is now within this District, to the amount sued for in the libel hereinafter referred to and costs, and if sufficient goods and chattels cannot be found, then attach their credits and effects or the credits and effects of either of them in the hands of the Atlantic Transport Company or in such other bodies' corporate or persons' hands the same may be found to the amount sued for and cost as aforesaid, to appear before the Judge of the District Court of the United States for the District of Maryland, at the United States Court Room, in the City of Baltimore, on the 8th day of December, next, to answer unto the libel and complaint of the State of Maryland, for the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased, in a cause of damages, and how you shall execute this precept you make known to us in our District Court, for the District aforesaid, and have you then and there this writ.

Witness the Honorable Thomas J. Morris, judge of our District Court, this 22nd day of November, in the year of our Lord, one thousand nine hundred and ten.

Issued 22nd day of November, 1910.

[Seal of Court]

ARTHUR L. SPAMER, Clerk.

MARSHAL'S RETURN ATTACHED TO ABOVE SUMMONS.

(12) "The Hamburg-American Steam Packet Company and Captain H. Meyerdirck, Master of the Steamship "Pretoria" not found, summoned the Lorant Stevedore Company, by ser-

vice on James C. Gorman, its manager, and copy summons with clause of foreign attachment left with him, summoned the Atlantic Transport Company, by service on James C. Gorman, its manager, and attached the credits belonging to the Hamburg-American Packet Company, and copy summons with clause of foreign attachment left with him, attached the Steamship "Patricia" and posted copy summons with clause of foreign attachment, November 22, 1910, vessel released on stipulation, November 26, 1910.

GEORGE W. PADGETT,
U. S. Marshal."

**PETITION OF LIBELLANTS TO AMEND LIBEL AND
ORDER OF COURT THEREON GRANTING THEM
LEAVE TO AMEND SAME.**

(13) Filed January 17, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antone, infant children of Mar-
tin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation; Cap-
tain H. Meyerdirck, Master of the
Steamship "Pretoria," and The Lorant
Stevedore Company, a body corporate,

In Admiralty.

To the Honorable the Judges of said Court:

The petition of Mary Szczesek, widow, and Joseph, John, Mary, Eva, Stanislaus, Frank and Antone, infant children of Martin Szczesek, libellants in the above entitled cause, respectfully represents unto your Honors:

1. That they filed their libel in the above entitled cause against the Hamburg-American Steam Packet Company, Captain H. Meyerdirck, Master of the steamship "Pre-

toria," a non resident of the said district, and the Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland, to recover for personal injuries resulting in the death of Martin Szczesek, the husband and father of the equitable plaintiffs, received while he was occupied in assisting with the loading of the cargo on the vessel, "Pretoria," as will more fully appear by reference to the libel filed in this case.

That one of the defendants sued was The Lorant Stevedore Company, alleged to be a Maryland corporation; that at the time of filing said libel, your libellants were informed (14) and believed that the said The Lorant Stevedore Company was a corporation; since that time your libellants are informed that there is no such corporation as The Lorant Stevedore Company, but that it is an adjunct, or a department of The Atlantic Transport Company, a West Virginia corporation doing business in this State;

2. Your libellants aver and believe that the deceased was employed at the time of his death by The Atlantic Transport Company, working through its stevedoring department, known as The Lorant Stevedore Company, this being only the name for this particular department of The Atlantic Transport Company;

3. Wherefore your libellants pray leave to amend their libel so as to substitute "The Atlantic Transport Company, a body corporate, duly incorporated under the laws of the State of West Virginia" in the place and stead of "The Lorant Stevedore Company," and they also pray that process of monition may issue to the Marshal of the District aforesaid, commanding him to summon the said The Atlantic Transport Company, and that it may be required to appear before this Honorable Court and answer the libel and amended libel filed herein, and that the said libel may be amended in the following particulars:

a. To amend the opening paragraph of said libel by inserting in the ninth line thereof the name of "The Atlantic Transport Company, a body corporate, duly incorporated under the laws of the State of West Virginia," in the place and stead of "The Lorant Stevedore Company, a body corporate, duly incorporated under the laws of the State of Maryland";

b. To amend paragraph three of said libel, line one on page two, by inserting the name of "The Atlantic Transport Company through its stevedoring department," in the place and stead of "The Lorant Stevedore Company";

c. To amend paragraph six, page 3, line 22, by inserting the name "The Atlantic Transport Company" in the place and stead of "The Lorant Stevedore Company";

(15) d. To amend paragraph 8, page 5, line 11, by inserting the name of "The Atlantic Transport Company" in the place and stead of "The Lorant Stevedore Company";

e. To amend the prayer for process, page 6, line 10, by substituting the name "The Atlantic Transport Company" in the place and stead of "The Lorant Stevedore Company";

And your petitioners will ever pray, &c.

SEMMES, BOWEN & SEMMES,
Proctors for Petitioners.

Leave granted as prayed this 17th day of January, A. D.,
1911.

JOHN C. ROSE,
District Judge.

SUMMONS.

(16) Issued January 17, 1911.

THE UNITED STATES OF AMERICA }
District of Maryland, } to-wit:

The President of the United States of America to the Marshal
for the Maryland District—Greeting:

We command you that you summon The Atlantic Transport Company, a body corporate, if it be found in your district, to appear before the Judge of the District Court of the United States of America for the District of Maryland, at the United States Court Room in the City of Baltimore, on the 2nd day of February next, to answer unto the libel of the State of Maryland, for the use of Mary Szczesek, widow of Martin Szczesek, individually and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased, in a cause of damages and how you shall execute this precept you make known to us in our District Court for the District aforesaid, and have you then and there this writ.

Witness the Honorable John C. Rose, Judge of our said District Court, this 17th day of January in the year of our Lord one thousand nine hundred and eleven.

Issued 17th day of January, 1911.

[Seal of Court]

ARTHUR L. SPAMER, Clerk.

**MARSHAL'S RETURN ENDORSED ON ABOVE
SUMMONS.**

"Summoned The Atlantic Transport Company, by service on James C. Gorman, its manager, and copy summons left with him, January 19, 1911.

GEORGE W. PADGETT,
U. S. Marshal."

APPEARANCE FOR RESPONDENT.

(17) Filed February 3, 1911.

IN THE COURT OF THE UNITED STATES FOR THE DISTRICT OF
MARYLAND.

State of Maryland, use of Mary Szczesek,	}	No.	Dkt.
<i>vs.</i>			
Hamburg-American Steam Packet Co., Captain H. Meyerdirck and The At- lantic Transport Co.			

Mr. Clerk:

Enter my appearance as proctor for the Atlantic Transport Co., in the above entitled case.

RALPH ROBINSON.

**ANSWER OF THE ATLANTIC TRANSPORT COMPANY OF
WEST VIRGINIA.**

(18)

Filed February 17, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antonie, infant children of Mar-
tin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation; Cap-
tain H. Meyerdirck, Master of the S. S.
"Pretoria," and Atlantic Transport
Company of West Virginia, a body cor-
porate.

In Admiralty.

To the Honorable Thomas J. Morris and John C. Rose, Judges
of the United States District Court for the District of
Maryland:

The separate answer of the Atlantic Transport Company
of West Virginia to the libel and complaint of State of Mary-
land, to the use of Mary Szczesek, widow of Martin Szczesek,
etc., against it and others in a cause of damages, civil and mari-
time, alleges and propounds:

1. Answering the first paragraph of the said libel this re-
spondent says, that inasmuch as the allegations therein set out
are not in any way connected with this defense, but concern
the liability of certain co-defendants, this respondent neither
admits nor denies the same, but leaves the said co-defendants
to make such answer as they or either of them may see fit.

2. Answering the second, third and fourth paragraphs of
the said libel, this respondent alleges:

That on the date and at the time mentioned in the said
(19) libel, Martin Szczesek was not in the employ of this
respondent, but this proponent alleges and propounds, upon

knowledge, information and belief that the said Martin Szczesek was in the employ of the Lorant Stevedore Company and was engaged with other employees in loading copper ingots into the steamship "Pretoria" in the Port of Baltimore, substantially in the manner in said paragraphs set out.

And further answering said second, third and fourth paragraphs of the said libel, this respondent alleges that it did not have the requisite corporate power to engage in the business of stevedoring for vessels other than those owned by it, at the time mentioned in the libel as the date of the accident therein mentioned and described, nor has it such corporate power now, nor has it ever had, or lawfully exercised such corporate power.

3. Answering the fifth paragraph, this respondent admits from information, knowledge and belief that the copper ingots were being loaded upon the bottom deck of the said vessel through the centre section of the forward hatchway, but denies that the said opening through which the tackle and sling were raised and lowered was about eight feet, and alleges that the said opening was nine feet two inches in width by sixteen feet in length, and was amply sufficient for the work when prosecuted skilfully and carefully by the said Martin Szczesek and his co-employees.

4. Answering the sixth paragraph of the said libel this respondent admits that the said Martin Szczesek was injured and died shortly thereafter, by the falling of the hatch coverings of the aft section of the hatch in the manner therein alleged, but denies that the same was due to its negligence or to that of any of its agents for which it could or ought to be held liable in this cause, and particularly denies:

(A) That it was the duty of this respondent or of its agents to have the said hatches, or any of them, bolted.

(B) That it failed to provide a sufficient opening through the said hatchway for the raising and lowering of the sling.

(C) That it was negligent in using the two derricks aforesaid with tackle shackled together as described in paragraph 4 of the said libel.

(D) That it was negligent in adjusting the position and setting of the boom of the derrick over the hatchway and that the setting of the said derrick caused the said sling and tackle

to pass too close to the cross beams of the said aft section of the forward hatch.

(E) That it is responsible for the injury and subsequent death of the said Martin Szczesek, for the manner in which the said empty sling and tackle was raised from the said hold.

And further answering said sixth paragraph this respondent alleges and propounds, upon information, knowledge and belief:

That the raising and lowering of the said tackle and net was under the exclusive operation and control of the co-employees of the said Martin Szczesek, under the following circumstances, all of which were unreservedly within the knowledge and information of the said Martin Szczesek at the time of his entering, and continuing upon the work in which he was engaged when he sustained the injuries which subsequently caused his death alleged in the libel;

There were located just forward of the hatchway two winches worked by steam, one on the port side and one on the starboard side of the vessel, each operated by co-employees of the said Martin Szczesek. Attached to each winch and a part thereof was a drum, upon which was wound a wire tackle, that the wire tackle on the drum of the winch on the port side was rigged to a boom, by which the copper was lifted over the side of the vessel, and the wire tackle on the starboardside was rigged (21) to a boom by which the copper was lowered into the hold, after it had been lifted over the side and by which also the empty net was raised therefrom; that on the deck and alongside of the open hatchway through which the copper was being loaded was stationed another co-employee of the said Martin Szczesek, whose duty it was to give the signal to the co-employee operating the starboard winch, as to when to start and stop his engine for the purpose of lowering the tackle and net into the hold and raising it therefrom; that as soon as the net loaded with copper was lowered into the hold, it was detached from the tackle by another co-employee and fellow-servant of the Martin Szczesek, working in the gang with him in the hold of the vessel, and an empty net was thereupon attached to the tackle, whereupon the signalman on deck gave the signal to the fellow-servant of the said Martin Szczesek in charge of the starboard winch to haul up.

5. Answering the seventh paragraph of the libel, this respondent says:

That it has no accurate information of the exact character and extent of the injuries sustained by the said Martin Szczesek,

6. Answering the eighth paragraph of the said libel, this respondent alleges upon information, knowledge and belief that the said Martin Szczesek was hired as a stevedore by the Lorant Stevedore Company to engage in loading copper ingots into the hold of the steamship "Pretoria," under the circumstances set out in this answer; that he had long been engaged in the employment of stevedore and was familiar with the work of loading copper ingots, and was fully cognizant of and familiar with the hazards and dangers of said employment; and this respondent denies that said Martin Szczesek had no warning that said hatchway opening was insufficient, if the same was insufficient, which this respondent denies, and this respondent denies that the said aft section of the hold was in a defective and dangerous condition and avers that if the same was in a defective or dangerous or unsafe condition, that said defective dangerous or unsafe condition was unknown to this respondent, and could not have been ascertained by the exercise of reasonable care and diligence on its part; and this respondent denies that the boom was improperly placed over the hatchway.

And further answering the said paragraph this respondent alleges upon knowledge, information and belief that if said hatchway was in a defective, dangerous or unsafe condition, or if the hatchway opening was insufficient, or if the boom was improperly placed over the said opening, these were all facts well within the knowledge and information of the said Martin Szczesek, or could have been readily ascertained by him by the exercise of due care and caution on his part, and having gone to work in the hold of the said vessel, knowing of the defective condition of these appliances or any of them, he thereby assumed the risk of accident because of their said defective and dangerous condition.

7. Answering the ninth paragraph of the said libel, this respondent denies that it failed to provide a reasonably safe and proper place for the said Martin Szczesek to work as stevedore, or that he was exposed to any risk or hazards not contemplated by his employment, and of which he had no warning, and denies that said accident was the result of negligence or want of care on its part.

8. That all and singular the premises are true;

Wherefore this respondent prays that this Honorable Court would be pleased to pronounce against the libel aforesaid and

to condemn the libellant in costs, and otherwise right and justice to administer in the premises.

THE ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA,

By P. A. S. FRANKLIN, President.

RALPH ROBINSON,

Proctor for Respondent.

Attest:

J. J. W. McGLONE, Secretary.

(23)

STATE OF NEW YORK, }
City of New York, } to-wit:

Before me, the subscriber, a notary public of the State of New York in and for the City of New York, duly commissioned and qualified, personally appeared this 16th day of February, 1911, P. A. S. Franklin, the president of the Atlantic Transport Company of West Virginia, and made oath in due form of law that the matters and facts set out in the foregoing answer are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

F. W. RIDGWAY,

Notary Public,

[Notary's Seal]

Notary Public, Kings County,
Certificate filed in New York County.

**ANSWER OF THE HAMBURG-AMERICAN STEAM
PACKET COMPANY.**

(24)

Filed June 2, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antonie, infant children of Mar-
tin Szczesek, deceased,

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation; Cap-
tain H. Meyerdirck, Master of the S. S.
"Pretoria," and the Atlantic Transport
Company of West Virginia, a body cor-
porate.

In Admiralty.

To the Honorable Thomas J. Morris and John C. Rose, Judges
of the United States District Court for the District of
Maryland:

The separate answer of the Hamburg-Amerikanische
Packet Fahrt Actien Gesellschaft, herein sued as the Hamburg-
American Steam Packet Company, to the libel and complaint
of State of Maryland, to the use of Mary Szczesek, widow of
Martin Szczesek, etc., against it and others in a cause of dam-
ages, civil and maritime, alleges and propounds:

1. Answering the first paragraph of the said libel, this
respondent says, that it was and still is the owner of the Steam-
ship "Pretoria," mentioned therein as the property of the
Hamburg-American Steam Packet Company, and that Captain
H. Meyerdirck was and still is the master of said steamship
"Pretoria," and that said Steamship "Pretoria" is not now
and was not at the time the libel in this cause of action was
filed and attachment thereon issued, within the jurisdiction of
this Honorable Court.

(25) 2. Answering the second paragraph of the said libel,
this respondent admits the facts therein stated.

3. Answering the second, third and four paragraphs of said libel, this respondent admits upon knowledge, information and belief the matters and facts therein stated to be substantially true, as therein stated.

4. Answering the fifth paragraph this respondent admits from information, knowledge and belief that the copper ingots were being loaded upon the bottom deck of the said vessel through the centre section of the forward hatchway, but denies that the said opening through which the tackle and sling were raised and lowered was about eight feet, and alleges that the said opening was nine feet two inches in width by sixteen feet in length, and was amply sufficient for the work when prosecuted skillfully and carefully by the said Martin Szczesek and his co-employees.

5. Answering the sixth paragraph of the said libel, this respondent admits that the said Martin Szczesek was injured by the failure of the hatch coverings of the aft section of the hatch in the manner therein alleged, but denies that the same was due to its negligence or to that of any of its agents for which it could or ought to be held liable in this cause; and particularly denies:

(A) That it was the duty of this respondent or of its agents to have the said hatches, or any of them, bolted.

(B) That it failed to provide a sufficient opening through the said hatchway for the raising and lowering of the sling.

(C) That it was negligent in using two derricks aforesaid with tackle shackled together as described in paragraph 4 of the said libel.

(26) (D) That it was negligent in adjusting the position and setting of the boom of the derrick over the hatchway and that the setting of the said derrick caused the said sling and tackle to pass too close to the cross beams of the said aft section of the forward hatch.

(E) That it is responsible for the injury to the said Martin Szczesek for the manner in which the said empty sling and tackle was raised from the said hold.

And further answering said sixth paragraph this respondent alleges and propounds, upon information, knowledge and belief:

That the raising and lowering of the said tackle and net was under the exclusive operation and control of the co-employee of the said Martin Szczesek, under the following circumstances, all of which were unreservedly within the knowledge and information of the said Martin Szczesek at the time of his entering, and continuing upon, the work in which he was engaged when he sustained the injuries alleged in the libel.

There were located just forward of the hatchway two winches worked by steam, one on the port side, and one on the starboard side of the vessel, each operated by co-employees of the said Martin Szczesek. Attached to each winch and a part thereof was a drum, upon which was wound a wire tackle; that the wire tackle on the drum of the winch on the port side was rigged to a boom, by which the copper was lifted over the side of the vessel, and the wire tackle on the starboard side was rigged to a boom by which the copper was lowered into the hold, after it had been lifted over the side and by which also the empty net was raised therefrom; that on the deck and alongside of the open hatchway through which the copper was being loaded was stationed another co-employee of the said Martin Szczesek, whose duty it was to give the signal to the co-employees operating the starboard winch, as to when to start and stop his engine for the purpose of lowering the tackle and net into the hold and raising it therefrom; that as soon as the net loaded (27) with copper was lowered into the hold, it was detached from the tackle by another co-employee and fellow servant of the said Martin Szczesek, working in the gang with him in the hold of the vessel, and an empty net was thereupon attached to the tackle, whereupon the signalman on deck gave the signal to the fellow servant of the said Martin Szczesek in charge of the starboard winch to haul up.

5. Answering the 7th paragraph of the libel, this respondent says:

That it has no accurate information of the exact character and extent of the injuries sustained by the said Martin Szczesek.

6. Answering the 8th paragraph of the said libel, this respondent alleges upon information, knowledge and belief that the said Martin Szczesek was hired as a stevedore by the Atlantic Transport Company to engage in loading copper ingots into the hold of the steamship "Pretoria," under the circumstances set out in this answer; that he had long been engaged in the employment of stevedore and was familiar with the work of loading copper ingots, and was fully cognizant of and familiar with the hazards and dangers of said employment;

and this respondent denies that said Martin Szczesek had no warning that said hatchway opening was insufficient, if the same was insufficient, which this respondent denies, and this respondent denies that the said aft section of the hold was in a defective and dangerous condition, and avers that if same was in a defective, or dangerous, or unsafe condition that said defective, dangerous or unsafe condition was unknown to this respondent, and could not have been ascertained by the exercise of reasonable care and diligence on its part; and this respondent denies that the boom was improperly placed over the hatchway.

And further answering the said paragraph this respondent alleges upon knowledge, information and belief that if said hatchway was in a defective, dangerous or unsafe condition, or if (28) the hatchway opening was insufficient, or if the boom was improperly placed over the said opening, these were all facts well within the knowledge and information of the said Martin Szczesek, or could have been readily ascertained by him by the exercise of due care and caution on his part, and having gone to work in the hold of the said vessel, knowing of the defective condition of these appliances or any of them he thereby assumed the risk of accident because of their said defective and dangerous condition.

7. Answering the ninth paragraph of the said libel, this respondent denies that it failed to provide a reasonably safe and proper place for the said Martin Szczesek to work as stevedore, or that he was exposed to any risks or hazards not contemplated by his employment, and of which he had no warning, and denies that said accident was the result of negligence or want of care on its part.

8. And this respondent further alleges and propounds, that upon the arrival of its said Steamship "Pretoria" in the harbor of Baltimore, it turned over the same to the Atlantic Transport Company, independent contractors, engaged in the business of stevedoring, for the purpose of unloading such cargo as remained in the said Steamship "Pretoria" (part of which had been discharged at the Port of Boston) and of loading such part of her cargo as was to be received in the City of Baltimore, and that the said Martin Szczesek was not in the employ of this respondent at the time of the happening of the matters and facts alleged to have occurred on the 22nd day of August, 1910, or at any other time.

9. And this respondent says that this court is without jurisdiction to hear and determine this case, because this case

was instituted under Article 67 of the Code of Public General Laws of the State of Maryland, of 1904, and under this article this court is not authorized to assess and divide the damages.

10. And that all and singular the premises are true.

Wherefore this respondent prays this Honorable Court may be pleased to pronounce against the libel aforesaid and to discharge the bond filed in this cause to secure the release of the Steamship "Patricia," and to condemn the libellant in (29) costs, and otherwise right and justice to administer in the premises.

HAMBURG-AMERIKANISCHE PACKET
FAHRT ACTIEN GESSELLSCHAFT,

By EMIL L. BOAS,

Resident Director & General Manager.

RALPH ROBINSON,

Proctor for respondent.

STATE OF NEW YORK, }
City of New York, } to-wit:

I hereby certify that on this 1st day of June in the year nineteen hundred and eleven, before me, the subscriber, a notary public of the State of New York in and for the City of New York aforesaid, duly commissioned and qualified, personally appeared Emil L. Boas, and made oath in due form of law that he is the Resident Director and General Manager for the Hamburg-Amerikanische Packet-fahrt Gesellschaft, and that the matters and facts set forth in the foregoing answer are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[Notarial Seal]

F. C. WACKEROW,

Notary Public,

Notary Public,

New York County, No. 190,

Registered No. 2216.

DECREE DISMISSING LIBEL AGAINST THE HAMBURG-AMERICAN STEAM PACKET COMPANY.

(170)

Filed June 2, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary
Szczech, widow of Martin Szczech,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antonie, infant children of Mar-
tin Szczech, deceased,

vs.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdirek, Master of the S. S.
"Pretoria," and Atlantic Transport
Company of West Virginia, a body cor-
porate.

(In Admiralty.)

This cause having been heard on the pleadings and proofs and having been argued and submitted by the advocates of the respective parties, and due deliberation having been had, and it appearing to the court that the libellant has no cause of action against the Hamburg-Amerikanische Packet Fahrt Actien Gesellschaft, herein sued as Hamburg-American Steam Packet Company, for the injuries alleged in the libel;

It is now ordered, adjudged and decreed by the court this 2nd day of June, 1911, that the libel as against above mentioned respondent be dismissed with costs to be taxed against the libellant, and on motion of the proctors for the defendant, Hamburg-American Steam Packet Company;

It is further ordered that unless an appeal be taken from this decree within the time limited by law and prescribed by the rules of this court, the stipulation filed for the release of the vessel attached in these proceedings, namely, the Steamship "Patricia" be, and the same is, hereby cancelled.

JOHN C. ROSE,
District Judge.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

(187)

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, infant
children of Martin Szczesek, deceased,
vs.

In Admiralty.

The Hamburg-American Steam Packet
Company, a foreign corporation, Cap-
tain H. Meyerdrick, Master of the S. S.
Pretoria, and The Atlantic Transport
Company of West Virginia, a body cor-
porate.

ROSE, District Judge:

This is a libel filed on behalf of the widow and infant children of Martin Szczesek. The deceased was working with Frank Imbrovek, the libellant in the foregoing case. He received fatal injuries in the same accident in which Imbrovek was hurt. The cases were tried together.

For the reasons therein stated I find that his death resulted from negligence of the Atlantic Transport Company. In this case that company set up the additional defense that admiralty has no jurisdiction to enforce the Maryland form of Lord Campbell's Act. For the reasons stated in my opinion in the case of *State of Maryland to the use of Pryor, et al. vs. Miller, et al.*, 180 Fed., 796, this defense is overruled.

The deceased was forty years of age. He leaves a wife and five children, the eldest of whom is sixteen, the youngest three years. He earned about ten dollars a week. An allowance of \$4,500 to his widow and children in the aggregate would be fair and reasonable.

I will hear the proctors for the libellants further as to the proper division of this sum among the widow and children.

DECREE AGAINST THE ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA.

(188)

Filed June 28, 1911.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, infant
children of Martin Szczesek, deceased,

vs.

The Atlantic Transport Company of
West Virginia, a body corporate, et al.]

In Admiralty.

DECREE.

This cause standing ready for a hearing, and the witnesses having been examined in the presence of the court and the proceedings read, heard and considered, and it appearing to the court that the libellants are entitled to recover from the Atlantic Transport Company of West Virginia damages resulting from the injuries sustained by Martin Szczesek, now deceased, and which damages amount in the entirety to forty-five hundred dollars (\$4,500.00);

It is adjudged, ordered and decreed this 28 day of June, 1911, by the District Court of the United States for the District of Maryland, that the Atlantic Transport Company of West Virginia, pay to Mary Szczesek, the widow of Martin Szczesek, the sum of twenty-five hundred dollars (\$2,500.00), to Joseph and John Szczesek, two of the infant libellants, the sum of two hundred and fifty dollars each, and to Mary, Eva and Stanislaus Szczesek, three of the infant libellants, the sum of five hundred dollars each, or to their proctors, together with interest thereon until paid, and their costs to be taxed. And it is further adjudged, ordered and decreed that unless the said Atlantic Transport Company of West Virginia within ten days from the date of this decree pay to the said libellants, or their proctors the respective sums hereinbefore decreed to them and the costs of their suit, execution for the enforcement of this decree may issue against the defendant, the Atlantic Transport Company of West Virginia, on behalf of any or all (189) of the libellants.

JOHN C. ROSE,
District Judge.

**PETITION OF RESPONDENT FOR APPEAL, ASSIGN-
MENT OF ERRORS AND ORDER OF COURT
THEREON ALLOWING APPEAL.**

(190)

Filed July 6, 1911.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF MARYLAND.

State of Maryland, to the use of Mary
Szczesek, widow of Martin Szczesek,
in her individual capacity, and as
mother and next friend of Joseph,
John, Mary, Eva, Stanislaus, Frank
and Antonie, infant children of Mar-
tin Szczesek, deceased,

vs.

The Atlantic Transport Company of
West Virginia.

To the Honorable John C. Rose, Judge of the United States
District Court:

The petition of the Atlantic Transport Company of West Virginia, respondent in the above entitled case, prays that it may be allowed an appeal to the Circuit Court of Appeals for the Fourth Circuit, from the decree passed in said case, bearing date the 27th day of June, 1911, and that a proper citation may be issued and served upon Mary Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased, or on their proctor or proctors, and that the record of the proceedings in said case be transmitted to said Circuit Court of Appeals, and that the said decree be reversed, and a decree entered in favor of your petitioner, dismissing said libel with costs.

Your petitioner files the following assignment of errors:

1. That it was error on the part of the District Court in holding that admiralty had jurisdiction of the cause of action against the stevedore.

1½. That it was error on the part of the District Court in holding that admiralty had jurisdiction to assess the damages in behalf of the equitable plaintiffs, and to apportion them

between the mother and the children of the decedent under the provisions of Article 67 of the Public General Laws of the State of Maryland.

(191) 2. That it was error on the part of the District Court in finding that there was evidence showing that one of the recognized uses of the pins was to prevent accidents such as that which happened.

3. That it was error on the part of the District Court in holding that it was negligence on the part of the stevedore to omit putting the pins in.

4. That it was error on the part of the District Court in finding that the possibility of an accident like the one in question was obvious.

5. That it was error on the part of the District Court in holding that the gang boss was a vice-principal.

6. That it was error on the part of the District Court in finding that there was any evidence to show a lack of supervision over the gang boss.

7. That it was error on the part of the District Court in holding that Bartholl was a vice-principal.

8. That it was error on the part of the District Court in finding or assuming that no orders had been issued by the stevedore to its foreman or gang bosses to the effect that they were not to allow the men to work under partly covered hatches, unless the pins were in.

9. That it was error on the part of the District Court in holding that the burden of proof was on the stevedore to show that it had issued orders to its foreman or gang bosses that they were not to allow the men to work under partly covered hatches unless the pins were in.

10. That it was error on the part of the District Court in finding that the stevedore did not give a thought to the pins.

11. That it was error on the part of the District Court in holding that because the stevedore did not give a thought to the pins, it neglected a duty which it owed to the said Martin Szczesek.

(192)

12. That it was error on the part of the District Court in finding that the mat might have caught had the shackles been properly hooked.

13. That it was error on the part of the District Court in holding that the accident to the said Martin Szczesek and his consequent death resulted from the negligence of the stevedore.

14. That it was error on the part of the District Court in holding that the burden of showing that the negligence of a fellow servant of the said Martin Szczesek contributed to the accident was on the respondent.

15. That it was error on the part of the District Court in holding that the accident to the said Martin Szczesek and his consequent death did not happen by reason of the negligence of his co-servant.

16. That it was error on the part of the District Court in sustaining the libel, and in decreeing in favor of the equitable plaintiffs the sum of \$4,500.00 with interest from June 27th, 1911, and costs in said case.

17. That it was error on the part of the District Court in not decreeing in favor of this petitioner and dismissing the libel in this case.

RALPH ROBINSON,

EDW. DUFFY,

Proctors for Petitioner.

Upon the foregoing petition it is by the United States District Court for the District of Maryland.

Ordered this sixth day of July, in the year nineteen hundred and eleven, that the appeal prayed for be and the same is hereby allowed. The appeal bond for the stay of execution and for costs is fixed at the sum of six thousand dollars (\$6,000).

JOHN C. ROSE,

District Judge.

Service of copy admitted this 6th day of July, 1911.

SEMMES, BOWEN & SEMMES,

Proctors for Libellant.

APPEAL BOND.

(193)

Filed July 6th, 1911.

Know all men by these prents:

That we, the Atlantic Transport Company of West Virginia, a corporation duly incorporated under the laws of the State of West Virginia, as principal, and American Bonding Company of Baltimore, a corporation of Maryland, of Baltimore, Maryland, as surety, are held and firmly bound unto State of Maryland, to the use of Mary Szczesek, and Joseph, John, Mary, Eva and Stanislaus Szczesek, in the full and just sum of six thousand dollars (\$6,000), to be paid to the said State of Maryland, to the use of Mary Szczesek, and Joseph, John, Mary, Eva and Stanislaus Szczesek, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves and our respective successors, jointly and severally, by these presents. Sealed with our seals and dated this 6th day of July, in the year of our Lord one thousand nine hundred and eleven.

Whereas lately at a District Court of the United States in and for the District of Maryland, in a suit depending in said court between State of Maryland to the use of Mary Szczesek et al. and the Atlantic Transport Company, a decree was rendered against the said Atlantic Transport Company, and the said Atlantic Transport Company having obtained an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said widow, Mary Szczesek and Joseph, John, Mary, Eva and Stanislaus Szczesek, infants, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fourth Circuit to be holden at Richmond on the day in the said citation mentioned:

Now, the condition of the above obligation is such, that if the said Atlantic Transport Company shall prosecute its appeal to effect, and answer all damages and costs, if it fail to make its plea good, then the above obligation to be void;

(194) else to remain in full force and virtue.

In testimony whereof the aforesaid Atlantic Transport Company of West Virginia has hereto set its corporate name by the hand of its president, and has hereunto affixed its corporate seal, duly attested by its secretary; and the aforesaid surety has hereto set its corporate name by the hand of its

president, and affixed its corporate seal, duly attested by its secretary the day and year first above written.

THE ATLANTIC TRANSPORT COMPANY
[Seal of the A. T. Co.] OF WEST VIRGINIA,
By P. A. S. FRANKLIN, President.

Attest:

J. J. McGLONE, Secretary.

AMERICAN BONDING COMPANY
[Seal of the A. B. Co.] OF BALTIMORE,
By JAS. T. WILSON,
Agent and Attorney in fact.

Attest as to surety:

JOHN G. SCOTT.

Approved—

JOHN C. ROSE,
District Judge.

CITATION.

UNITED STATES OF AMERICA, } ss.:

The President of the United States to the State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, individually, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie Szczesek, infant children of Martin Szczesek, deceased,—
Greeting:

(195) You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, on the 4th day of August, next, pursuant to an appeal from a decree of the District Court of the United States for the District of Maryland in your favor passed in a cause in said court wherein the Atlantic Transport Company of West Virginia, a corporation, is respondent, and you are libellant, to show cause, if any there be, why the decree rendered against the said respondent in

said cause mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland this 6th day of July, in the year of our Lord, one thousand nine hundred and eleven.

JOHN C. ROSE,
District Judge.

Attest:

ARTHUR L. SPAMER,
Clerk of said District Court.

Service of the within citation acknowledged this 10th day of July, 1911.

SEMMES, BOWEN & SEMMES, Proctors.

ORDER TO TRANSMIT RECORD.

(196) And, thereupon, it is ordered by the court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, and the same is transmitted accordingly.

Teste: ARTHUR L. SPAMER, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA, }
District of Maryland, } to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things hereunto relating in the therein entitled case.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, this 31st day of July, 1911.

ARTHUR L. SPAMER, Clerk.

STIPULATION.

Filed Aug. 5, 1911.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES
FOR THE FOURTH CIRCUIT.

State of Maryland, to the use of Mary	}
Szczeseck, et al.,	
<i>vs.</i>	
The Atlantic Transport Company of	}
West Virginia, et al.	

Inasmuch as the above entitled case and the case of Frank Imbrovek *vs.* Atlantic Transport Company of West Virginia, et al., now on appeal in the above entitled court, were tried together in the lower court, and inasmuch as the evidence in both cases is the same, it is, therefore, stipulated by counsel for the respective parties, that the clerk in printing the record in the above entitled case, need not print the evidence, and inasmuch as the opinions of the lower court in the above two cases were so closely connected that the clerk in certifying the record on appeal has inserted in the records in each of the above two cases, the opinions of the court in both, it is, therefore, stipulated between counsel for the respective parties, that the clerk in printing the record in the above entitled case need not print the opinion of the lower court in the Imbrovek case.

SEMMES, BOWEN and SEMMES,
Proctors for Appellee.
BOND, ROBINSON & DUFFY,
Proctors for Appellant.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin
Szczeseck, and as Mother and Next Friend of Joseph and Other
Infant Children of Martin Szczeseck, Deceased, Appellee.

Appeal from the District Court of the United States for the District
of Maryland, at Baltimore.

August 4, 1911, transcript of record is filed and cause docketed.

Same day, appearance of Edward Duffy for the appellant, and
the appearance of W. H. Price, Jr., C. K. Mount, John E. Semmes,
Jesse N. Bowen and John E. Semmes, Jr., for the appellee, entered,
orders filed.

Sept. 2, 1911, twenty copies of the printed record are filed.

December 16, 1911, (November Term, 1911,) cause is continued
to the February Term, 1912, by the court.

February 8, 1912, (February Term, 1912,) cause came on to be
heard before Goff and Pritchard, Circuit Judges, and Dayton, Dis-
trict Judge, and is argued, together with case No. 1058, by counsel,
and submitted.

February 20, 1912, (Same Term) court announced and filed its
opinion, which is as follows, to-wit:

Opinion.

Filed February 20, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus

STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin
Szczeseck, and as Mother and Next Friend of Joseph and Other
Infant Children of Martin Szczeseck, Deceased, Appellee.

Appeal from the District Court of the United States for the District
of Maryland, at Baltimore.

[Argued February 8, 1912. Decided February 20, 1912.]

Before Goff and Pritchard, Circuit Judges, and Dayton, District
Judge.

Ralph Robinson and Edward Duffy (Nicholas P. Bond on the
Brief) for Appellant, and John E. Semmes, Jr., (John E. Semmes
and Jesse N. Bowen on the Brief) for the Appellee.

STIPULATION.

Filed Aug. 5, 1911.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES
FOR THE FOURTH CIRCUIT.

State of Maryland, to the use of Mary Szezeseck, et al.,	}	vs.	The Atlantic Transport Company of West Virginia, et al.

Inasmuch as the above entitled case and the case of Frank Imbrovek *vs.* Atlantic Transport Company of West Virginia, et al., now on appeal in the above entitled court, were tried together in the lower court, and inasmuch as the evidence in both cases is the same, it is, therefore, stipulated by counsel for the respective parties, that the clerk in printing the record in the above entitled case, need not print the evidence, and inasmuch as the opinions of the lower court in the above two cases were so closely connected that the clerk in certifying the record on appeal has inserted in the records in each of the above two cases, the opinions of the court in both, it is, therefore, stipulated between counsel for the respective parties, that the clerk in printing the record in the above entitled case need not print the opinion of the lower court in the Imbrovek case.

SEMMES, BOWEN and SEMMES,
Proctors for Appellee.
BOND, ROBINSON & DUFFY,
Proctors for Appellant.

Proceedings in the United States Circuit Court of Appeals for the Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin
Szczeseck, and as Mother and Next Friend of Joseph and Other
Infant Children of Martin Szczeseck, Deceased, Appellee.

Appeal from the District Court of the United States for the District
of Maryland, at Baltimore.

August 4, 1911, transcript of record is filed and cause docketed.

Same day, appearance of Edward Duffy for the appellant, and
the appearance of W. H. Price, Jr., C. K. Mount, John E. Semmes,
Jesse N. Bowen and John E. Semmes, Jr., for the appellee, entered,
orders filed.

Sept. 2, 1911, twenty copies of the printed record are filed.

December 16, 1911, (November Term, 1911,) cause is continued
to the February Term, 1912, by the court.

February 8, 1912, (February Term, 1912,) cause came on to be
heard before Goff and Pritchard, Circuit Judges, and Dayton, Dis-
trict Judge, and is argued, together with case No. 1058, by counsel,
and submitted.

February 20, 1912, (Same Term) court announced and filed its
opinion, which is as follows, to-wit:

Opinion.

Filed February 20, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
versus

STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin
Szczeseck, and as Mother and Next Friend of Joseph and Other
Infant Children of Martin Szczeseck, Deceased, Appellee.

Appeal from the District Court of the United States for the District
of Maryland, at Baltimore.

[Argued February 8, 1912. Decided February 20, 1912.]

Before Goff and Pritchard, Circuit Judges, and Dayton, District
Judge.

Ralph Robinson and Edward Duffy (Nicholas P. Bond on the
Brief) for Appellant, and John E. Semmes, Jr., (John E. Semmes
and Jesse N. Bowen on the Brief) for the Appellee.

Per Curiam:

We find no error in the record of this cause. We refer to the opinion of the learned judge below, who entered the decree complained of, which fully accords with the views of this court. 190 Fed., 240.

Affirmed.

February 26, 1912, (Same Term), the court made and entered the following decree, to-wit:

Decree.

Filed and Entered February 26, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
vs.
STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin
Szczesek, and as Mother and Next Friend of Joseph and Other
Infant Children of Martin Szczesek, Deceased, Appellee.

Appeal from the District Court of the United States for the District
of Maryland.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this case, be, and the same is hereby, affirmed, with costs.

NATHAN GOFF.

February 26th, 1912.

Petition of Appellant to Stay Mandate.

Filed March 9, 1912.

In the United States Court of Appeals for the Fourth Circuit.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

FRANK IMBROVEK.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA

vs.

STATE OF MARYLAND to the Use of MARY SZCZESSEK, Widow of Martin Szczesek, in Her Individual Capacity and as Mother and Next Friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, Infant Children of Martin Szczesek, Deceased.

To the Honorable the Judges of said Court:

The petition of the Atlantic Transport Company of West Virginia respectfully shows:

That it is about to file in the Supreme Court of the United States a petition for a writ of certiorari in the above two cases; that it served a copy of said petition for said writ of certiorari on counsel for the appellees on March 8th, 1912, giving them notice that on Monday, March 25th, 1912, at the opening of court on that day, or as soon thereafter as counsel can be heard, it will move the Supreme Court of the United States to grant the said writ of certiorari.

Wherefore your petitioner prays that the mandates of this court in the above two cases be withheld until the Supreme Court of the United States passes on the question as to whether or not it will grant the writ of certiorari as aforesaid.

EDW. DUFFY,
Counsel for Petitioner.

STATE OF MARYLAND,
City of Baltimore. To wit:

I hereby certify that on this 8th day of March, in the year nineteen hundred and twelve, before me, the subscriber, a Notary Public of the State of Maryland in and for Baltimore City aforesaid, duly commissioned and qualified, personally appeared Edward Duff, counsel for the petitioner, and he made oath in due form of law that the matters and facts set out in the foregoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal.

[NOTARIAL SEAL.]

EDWARD P. HILL,
Notary Public.

Order Staying Mandate.

Filed and Entered March 9, 1912.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1059.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,
vs.STATE OF MARYLAND, Use of MARY SZCZESEK, Widow of Martin
Szczesek, and as Mother and Next Friend of Joseph and Other
Infant Children of Martin Szczesek, Deceased, Appellee.Appeal from the District Court of the United States for the District
of Maryland, at Baltimore.Upon the petition of the appellant, by its counsel, Edward Duffy,
and for good cause shown,It is ordered that the mandate of this court in the above case be,
and the same is hereby, stayed pending the application of the
appellant for a writ of certiorari in the Supreme Court of the United
States, provided said application is filed in the said Supreme Court
by April 2, 1912.NATHAN GOFF,
Circuit Judge, Presiding.

March 9, 1912.

*Clerk's Certificate.*UNITED STATES OF AMERICA,
*Fourth Circuit, ss:*I, Henry T. Meloney, Clerk of the United States Circuit Court
of Appeals for the Fourth Circuit, do certify that the foregoing is
a true copy of the entire record and proceedings in the therein en-
titled cause as the same remains upon the records and files of the
said Circuit Court of Appeals.In testimony whereof I hereto set my hand and affix the seal
of the said United States Circuit Court of Appeals for the Fourth
Circuit, at Richmond, on this 11th day of March, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
*Clerk of the United States Circuit Court
of Appeals, Fourth Circuit.*

In the United States Circuit Court of Appeals for the Fourth Circuit.

ATLANTIC TRANSPORT COMPANY OF WEST VIRGINIA, Appellant,

vs.

STATE OF MARYLAND to the Use of MARY SZCZESEK, Widow of Martin Szczesek, in Her Individual Capacity and as Mother and Next Friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, Infant Children of Martin Szczesek, Deceased, Appellees.

It is hereby stipulated and agreed that the certified transcript of the Record in the above entitled case heretofore filed in the Supreme Court of the United States may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States in the above entitled case.

EDW. DUFFY,

Proctor for Appellant.

JOHN E. SEMMES, JR.,

Proctor for Appellees.

UNITED STATES OF AMERICA, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of counsel is a true copy of the original filed April 13, 1912, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of April, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

*Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.*

United States Circuit Court of Appeals, Fourth Circuit.

UNITED STATES OF AMERICA,

Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 10th day of April, 1912, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified transcript of the Record in the above entitled case heretofore filed in the Supreme Court of the United States may be taken as the return to the writ of certiorari granted by the Supreme Court of the United States in the above entitled case.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, on this 13th day of April, A. D., 1912.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,

*Clerk U. S. Circuit Court of Appeals
for the Fourth Circuit.*

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Atlantic Transport Company of West Virginia is appellant, and State of Maryland, to the use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity and as mother and next friend of Joseph, John, Marv, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the District of Maryland, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 10th day of April, in the year of our Lord one thousand nine hundred and twelve.

JAMES H. McKENNEY,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23105. Supreme Court of the United States. No. 1029. October Term. 1911. Atlantic Transport Co. of West Virginia. vs. State of Maryland to the use of Mary Szczesek, widow, etc. Writ of Certiorari. The Execution of the within writ appears from the schedules thereunto annexed. Henry T. Meloney, Cl'k U. S. Cir. Ct. Appeals.

[Endorsed:] File No. 23105. Supreme Court U. S., October Term. 1911. Term No. 1029. Atlantic Transport Co. of West Virginia vs. State of Maryland to the use of Mary Szczesek, widow, etc. Writ of certiorari and return. Filed April 15, 1912.



MAR 12 1912

JAMES H. KENNEY,

Clerk

IN THE

Supreme Court of the United States.

October Term, 1911.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA.*Petitioner,*

No. 1028504

FRANK IMBROVER,

*Respondent.*ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA.*Petitioner,*

No. 1028505

STATE OF MARYLAND TO THE USE OF MARY
SZCZESSEK, WIDOW OF MARTIN SZCZESSEK, IN
HER INDIVIDUAL CAPACITY AND AS MOTHER
AND NEXT FRIEND OF JOSEPH, JOHN, MARY,
EVA, STANISLAUS, FRANK AND ANTONIE, IN-
FANT CHILDREN OF MARTIN SZCZESSEK, DE-
CEASED.*Respondents.*Petition for Writ of Habeas Corpus and Relief
in Support Thereof.

NICHOLAS P. BOND,

Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,

Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1911.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA,

Petitioner,

vs.

FRANK IMBROVEK,

Respondent.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA,

Petitioner,

vs.

STATE OF MARYLAND, TO THE USE OF MARY
SZCZESEK, WIDOW OF MARTIN SZCZESEK, IN
HER INDIVIDUAL CAPACITY AND AS MOTHER
AND NEXT FRIEND OF JOSEPH, JOHN, MARY,
EVA, STANISLAUS, FRANK AND ANTONIE, IN-
FANT CHILDREN OF MARTIN SZCZESEK, DE-
CEASED,

Respondents.

To the Above-Named Respondents:

PLEASE TAKE NOTICE, That under the rules of the Su-
preme Court of the United States I shall file the annexed
petition for writ of *certiorari* in the Supreme Court of the

United States, together with printed copies thereof, and copies of the records of the two cases referred to in said petition, numbered 1058 and 1059, and I shall on Monday, the 25th day of March, 1912, at the opening of Court on that day, or as soon thereafter as counsel can be heard, move the Court to grant the writ of *certiorari*, as in said petition prayed.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.

WE HEREBY ADMIT, That on the eighth day of March, 1912, a copy of this notice, together with a copy of the petition for a writ of *certiorari* and the Brief annexed hereto, was served upon us.

SEMMES, BOWEN & SEMMES,
Counsel for Above-Named Respondents.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1911.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA,

Petitioner,

vs.

FRANK IMBROVEK,

Respondent.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA,

Petitioner,

vs.

STATE OF MARYLAND, TO THE USE OF MARY
SZCZESEK, WIDOW OF MARTIN SZCZESEK, IN
HER INDIVIDUAL CAPACITY AND AS MOTHER
AND NEXT FRIEND OF JOSEPH, JOHN, MARY,
EVA, STANISLAUS, FRANK AND ANTONIE, IN-
FANT CHILDREN OF MARTIN SZCZESEK, DE-
CEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH
CIRCUIT.

*To the Honorable the Justices of the Supreme Court of the
United States:*

Your Petitioner, Atlantic Transport Company of West
Virginia, a corporation organized and existing under the laws

of the State of West Virginia, respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, thereby commanding the said Court to certify and send to this Court on a certain day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the cases therein pending, entitled "Atlantic Transport Company of West Virginia, Appellant, vs. Frank Imbrovek, Appellee, No. 1058," and "Atlantic Transport Company of West Virginia, Appellant, vs. State of Maryland, to the Use of Mary Szczesek, widow of Martin Szczesek, in her individual capacity, and as mother and next friend of Joseph, John, Mary, Eva, Stanislaus, Frank and Antonie, infant children of Martin Szczesek, deceased, Appellees, No. 1059," to the end that the same may be reviewed and determined by this Court, as provided in Section 6 of the Act of Congress, entitled "An Act to establish Circuit Courts of Appeal and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, and that your Petitioner may have such other and further relief in the premises as to this Court may seem proper and in conformity with said Act; and that the decrees of the Circuit Court of Appeals and of the District Court in each of said cases, and every part thereof may be reversed by this Honorable Court.

And your petitioner, in support of this its petition, respectfully represents and alleges the following reasons:

First—That the above two cases arose out of the injury to Frank Imbrovek and the death of Martin Szczesek, said injury and death being the result of the same accident, said two cases having been tried together in the United States District Court for the District of Maryland, sitting in admiralty, and argued together in the United States Circuit Court of Appeals for the Fourth Circuit.

Second—That Imbrovek and Szczesek were stevedores in the employ of the Atlantic Transport Company, a corporation which carried on the stevedoring business; that at the time of the accident the Transport Company was engaged in loading the steamship "Pretoria" belonging to the Hamburg-American Steam Packet Company, while tied to her pier in the harbor of Baltimore; that in each case a libel was filed against the Transport Company and the Packet Company, charging them with responsibility for the injury to Imbrovek and the death of Szczesek, by reason of their negligence; that the District Court dismissed the libel in each case as to the Packet Company; that by the dismissal of the libels against the Packet Company, two questions were left in each case, viz:

- (1) Has a Court of Admiralty jurisdiction over a case brought by a stevedore against his employer for the negligence of the employer in failing to furnish the stevedore with a safe place in which to work, where the work is being done on board a steamship tied to a pier, *the stevedore having no contractual relation with the steamship, her master or owner?*

- (2) Did the master fail to furnish a safe place?

Third—That the District Court, Judge Rose, determined the first question in the affirmative upon two grounds, namely:

- (1) That inasmuch as the tort occurred on a vessel in navigable waters, it was within the jurisdiction of a Court of Admiralty, because locality is the sole and exclusive test of jurisdiction in admiralty with respect to torts, and that the nature of the tort and the relation of the parties to each other, to the ship and to the locality have no bearing on the question.

- (2) That conceding *gratia arguendi* that locality is not the sole and exclusive test then admiralty has jurisdiction, because the claims of stevedores are essentially maritime in their nature and are within the jurisdiction of a Court of Admiralty.

That this question was determined in the negative on both points by the Circuit Court of Appeals for the Ninth Circuit Gilbert and Ross, Circuit judges, and Hawley, district judge (Campbell vs. Hackfeld, 125 Fed. Rep. 696, cited with approval in *The Blackheath*, 195 U. S. 367), where it was held:

(a) That locality was not the sole and exclusive test, but the relation of the parties must also be taken into consideration, and it also held,

(b) That the claim of a stevedore against his employer where the *stevedore had no contractual relation with the ship, its master or owner*, was not of a maritime nature.

That locality is *not* the sole and exclusive test of jurisdiction of admiralty with respect to torts is unquestionably the finding of this Court in the following cases:

The Blackheath, 195 U. S. 369;
 Simmons vs. The Jefferson, 215 U. S. 130;
 Martin vs. West, 222 U. S. 191.

Fourth—That the District Court determined the second question in the affirmative; that the District Court for the Southern District of New York (*The Picqua*, 97 Fed. Rep. 649), under precisely similar circumstances, held that the master was not liable.

Fifth—That the United States Circuit Court of Appeals for the Fourth Circuit, by Goff and Prichard, Circuit judges, and Dayton, district judge, affirmed the decision of Judge Rose on both questions without filing any opinion.

Your petitioner, therefore, alleges that on the questions involved in this case there is a difference of opinion between the different Circuit Courts of Appeal, and your petitioner, therefore, submits, for the reasons herein set forth and those more at large stated in the brief herein filed that the questions involved in these cases make it proper that this Court should grant the writ of *certiorari* as prayed.

And your petitioner will ever pray, etc.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.

STATE OF MARYLAND,
Baltimore City, to wit:

I hereby certify that on this 8th day of March, nineteen hundred and twelve, personally appeared before me, a notary public of the State of Maryland in and for Baltimore City aforesaid, Edward Duffy, and made oath in due form of law that he is of counsel for the Atlantic Transport Company, of West Virginia, and that the matters and facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Witness my hand and notarial seal the day
and date last above written.

(Seal)

EDWARD P. HILL,
Notary Public.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and

the case is one in which the prayer of the petitioner should be granted by this Court.

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BRIEF FOR PETITIONER.

In this brief we shall not attempt to argue the question as to whether these cases were properly decided, but shall content ourselves with endeavoring to show that because of the diversity of opinion on the questions involved in these cases this Court should finally settle these questions.

The libel in each of these cases is filed by the libellant against the Hamburg-American Steam Packet Company, Captain H. Meyerdirk, Master of the Steamship "Pretoria" belonging to the Packet Company, and the Atlantic Transport Company, Meyerdirk was never summoned. A writ of foreign attachment was prayed for, and under it the Steamship "Patricia" belonging to the Packet Company was seized. Each libel charges the same acts of negligence, to wit:

1. That it was the duty of the respondents to bolt the hatches.
2. That the respondents were negligent in failing to provide a sufficient opening through which the net was lowered and raised.

There were other acts of negligence charged, but the proof was confined to the above two. The evidence in both cases will be found Record 1058, pages 20 to 83.

The District Court dismissed the libel in each case against the Packet Company, and held the Transport Company liable in the amount of forty-five hundred dollars (\$4,500.00) in each case.

The principal errors assigned were:

1. That it was error to hold that admiralty had jurisdiction.

2. That it was error to hold that the accident happened by reason of the negligence of the Transport Company.

The first question is, therefore:

1. Has a Court of admiralty jurisdiction over a case brought by a stevedore against his employer for the negligence of the employer in failing to furnish the stevedore with a safe place in which to work where the work is being done on board a steamship tied to a pier, *the stevedore having no contractual relation with the steamship, her master or owner.*

On this question the District Court in its opinion, which will be found in Record No. 1058, pages 85 to 96, says on page 87:

"As the case stands on the pleadings and proofs the libellant must show: (2) That the Court of admiralty has jurisdiction."

On page 88 of the Record, JUDGE ROSE says:

"The jurisdiction over torts depends on locality and not on the nature or origin of the wrong done."

And after an elaborate discussion of the question, he concludes, that because the accident happened on navigable waters, admiralty has jurisdiction. The Circuit Court of Appeals concurred in the result arrived at by Judge Rose, without giving its reasons therefor.

This Court has recently said that the question as to whether a tort is maritime, "must be resolved according to locality and the character of the injured thing." (Martin vs. West, 222 U. S. 191, 197.)

So also in the Blackheath, 195 U. S. 361, this Court sustained the jurisdiction in admiralty because of the nature of the thing injured, and not alone on the locality of the tort.

The doctrine of these last two cases is applied by the Ninth Circuit to a case like the present.

In that Circuit in the case of Campbell vs. Hackfeld, 125 Fed. Rep. 696 (which is cited with approval in The Blackheath, *supra*), GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge, speaking through JUDGE ROSS, say:

"This cause comes here on appeal from a decree of the District Court for the District of Hawaii sustaining an exception of the appellee to the jurisdiction of the Court over the parties or the cause of action stated in the libel, and dismissing the libel, without prejudice, for want of jurisdiction. The libellant was a stevedore, and the libellee a corporation engaged in the business of loading and unloading vessels at Honolulu. The libel shows that in pursuance of its business the libellee on the 26th day of July, 1902, undertook to unload a cargo of coal from the Norwegian bark Aeolus, then anchored in navigable waters of the port of Honolulu, and that the libellant was one of the libellee's employees engaged in that work; that while so engaged in the hold of the vessel the libellant was, by reason of the carelessness of the libellee and of other of its employees, severely injured, for which injury he asked damages. Not only does the libel fail to allege anything against the ship, its owner, officers or crew, but it affirmatively alleges that the persons who were engaged in the unloading of said bark Aeolus were all employees of said

defendant, and not members of the crew, or employees of said bark *Aeolus*, and not fellow servants of any capacity with any of the employees of said bark *Aeolus*. Instances are numerous in which stevedores have maintained libels for injuries sustained by reason of defective machinery or appliances of the ship, or by reason of the negligence of its owner or of some of its officers or crew. Many of such cases are referred to in *The Anaces*, 93 Fed. 240, and in the briefs of counsel in the present case. But no case has been cited, and it is asserted by counsel that no case can be found, where a stevedore was allowed to maintain in a Court of admiralty an action for damages, against the stevedore who employed him, for injuries sustained by reason of the negligence of the head stevedore, or of one or more of his other employees. The mere fact that no such case can be found in the books tends strongly to show that they are outside the acknowledged limit of admiralty cognizance over marine torts, for it would be little short of absurd to suppose that there have not been hundreds and hundreds of instances where stevedores have been injured in their work through the negligence of the contracting stevedore or of some of his employees."

The Court then takes up and discusses fully the question involved, and finally concludes as follows:

"We are of opinion that the ruling of the Court below was right, and it is not in conflict with any previous decision of which we are aware, and that it in no way tends to unsettle any rule of admiralty, or to introduce into that branch of the law any complication or uncertainty."

It will, therefore, be perceived, that the Circuit Court of Appeals for the Ninth District arrived at a different conclu-

sion from that arrived at by the Fourth Circuit in the present cases.

It was contended by the respondents that the present case differs from the Hackfeld case in that here you have a libel filed against both the owner of the ship and the Stevedore Company, and that as admiralty clearly has jurisdiction in the action against the owner, it would, therefore, have jurisdiction against the owner and the Stevedore Company jointly. Even had the owner been held responsible (if the Hackfeld decision is correct), it would not be possible to hold the Stevedore Company, for if it did not commit a maritime tort, it is not possible for the respondents to make it maritime by anything they might do. If a Court has not jurisdiction over one party, it is not possible to give it jurisdiction by joining another party with him. In this case, however, it will be found from the evidence that the respondents did not attempt to offer any evidence to show that the ship was in any way guilty of negligence, and in consequence thereof the libel as to the ship was dismissed, so that if the Hackfeld decision is correct, there was never any question of maritime tort in the case other than the allegation of the libel attempted to make one.

This contention of the respondents was based on the *Clan Graham*, 153 Fed. Rep. 977. In this case the District Court for the District of Oregon, Wolverton, District Judge, held: That under Admiralty Rule 46 the Court may permit the joinder in an action in tort for a personal injury of a claim *in rem* against a vessel and one *in personam* against stevedores, although the latter are neither master nor owner of the vessel when the injury is alleged to have resulted from the joint negligence of both, and the joinder will best subserve the ends of justice.

It will be noted by this Court, however, that in this case the question of jurisdiction was not raised.

JUDGE ROSE further says (Record, page 93):

"The tort complained of occurred on navigable waters and on board of a ship. The parties to it were engaged at the time in work absolutely essential to the business of the ship in navigating the seas. The tort alleged is the failure of one of them to use due care in protecting the other from the dangers of that work. It would seem that such a tort is clearly maritime."

And as authority for this proposition he cites:

Norwegian S. S. Co. vs. Washington, 57 Fed.
224;

The Maine, 51 Fed. 954;

The John Shay, 81 Fed. 216.

It has long been a question in the various Courts as to whether the contract of a stevedore with the *ship, its owner or master* is a maritime contract. The earlier decisions held that it was not. It was thereafter held that the stevedore had a lien upon the ship if the loading took place in a foreign port. Now the Courts are gradually getting around to the doctrine that such a contract is maritime. The three cases last mentioned are cases of this sort, namely, cases where the stevedore had a contract with the ship, its owner or master, and they, therefore, held that the contract was in its nature maritime. They did not involve the question involved in the case of Campbell vs. Hackfeld or in this case. In the present case neither Imbrovek nor Szczesek had a contract with the ship, its owner or master. Their contract was with the Transport Company.

The second question is:

Did the master fail to furnish a safe place?

While we feel that the Circuit Court of Appeals failed to properly apply the doctrine of master and servant so clearly

laid down by this Court in the cases of *Alaska Mining Co. vs. Whelan*, 168 U. S. 86, and *B. & O. R. R. Co. vs. Baugh*, 149 U. S. 368, to the facts of this case; and while the District Court for the Southern District of New York, in *The Picqua*, 97 Fed. Rep. 649, on practically the same state of facts, arrived at a different conclusion, yet we shall say no more on this question, for we appreciate the fact that if this Court does not feel that it should issue the writ because of the diversity of decisions on the jurisdictional question, it should not be burdened in seeing that the law applicable to employer and employee is properly applied, especially when the rule which governs a particular case depends so largely on the facts of that case.

We, therefore, submit that by reason of the diversity of decisions on the jurisdictional question involved in this case, that this is a case in which this Court should grant the writ as prayed.

Respectfully submitted,

NICHOLAS P. BOND,
Of Counsel for Petitioner.

BOND, ROBINSON & DUFFY,
Counsel.





23

FILED.

MAR 28 1912

JAMES B. McKENNA

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1911.

No. ~~584~~ 215

ATLANTIC TRANSPORT COMPANY OF WEST VIR-
GINIA, PETITIONER,

vs.

FRANK IMBROVEK, RESPONDENT.

No. ~~585~~ 216

ATLANTIC TRANSPORT COMPANY OF WEST VIR-
GINIA, PETITIONER,

vs.

STATE OF MARYLAND TO THE USE OF MARY SZOZE-
SEK, WIDOW OF MARTIN SZOZESEK, in her Individual Capac-
ity and as Mother and Next Friend of JOSEPH, JOHN,
MARY, EVA, STANISLAUS, FRANK AND ANTONIE,
Infant Children of MARTIN SZOZESEK, Deceased, RESPOND-
ENTS.

BRIEF FOR RESPONDENTS.

JOHN E. SEMMES, JR.,

Of Counsel for Respondents.

SEMMES, BOWEN AND SEMMES,

Counsel.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1911.

No. 1028.

ATLANTIC TRANSPORT COMPANY OF WEST VIR-
GINIA, PETITIONER,

vs.

FRANK IMBROVEK, RESPONDENT.

No. 1029.

ATLANTIC TRANSPORT COMPANY OF WEST VIR-
GINIA, PETITIONER,

vs.

STATE OF MARYLAND TO THE USE OF MARY SZCZE-
SEK, WIDOW OF MARTIN SZCZESEK, in her Individual Capac-
ity and as Mother and Next Friend of JOSEPH, JOHN,
MARY, EVA, STANISLAUS, FRANK AND ANTONIE,
Infant Children of MARTIN SZCZESEK, Deceased, RESPOND-
ENTS.

BRIEF FOR RESPONDENTS.

STATEMENT.

The libels in these cases were filed against the Hamburg-American Steam Packet Company, a foreign corporation, with a writ of foreign attachment, and against the Atlantic Transport Company, a corporation which was conducting a stevedoring business. The Master of the steamship "Pretoria," belonging to the Packet Company, was also named as

joint respondent. There was a return of "non est" as to him. The testimony adduced on behalf of the libellants showed negligence on the part of the Hamburg-American Steam Packet Company, as well as the Atlantic Transport Company. It was, however, upon the testimony produced by the Atlantic Transport Company, that the Steam Packet Company was ~~the~~ exonerated and the libel dismissed as to it.

The question of whether or not a Court of Admiralty would have jurisdiction of a suit for damages brought by a stevedore against a stevedore company alone was not before the District Court. We respectfully call the attention of this Honorable Court to these facts, inasmuch as the diversity of decisions, as stated by the petitioners, in reality rests upon the one decision of *Campbell vs. Hackfeld & Co.*, 125 Fed. Rep. 696. All the other decisions which a most diligent search has revealed, definitely decide that *locality is the sole test of the jurisdiction of admiralty over torts.* The Hackfeld case is clearly distinguishable from the one at bar, in that the libel in that case was filed by a stevedore against a stevedore company, without joining the ship and its owners, and the Court uses this language (page 697) :

"Not only does the libel fail to allege anything against the ship, its owner, officers or crew, but it affirmatively alleges 'that the persons who were engaged in the unloading of said bark Aeolus were all employees of said defendant and not members of the crew or employees of said bark Aeolus, and not fellow servants of any capacity with any of the employees of said bark Aeolus.'"

The Court thus based its decision on the ground that the allegations of the libel had not only failed to join the ship or its officers or crew in any manner, but that it was distinctly alleged that the latter were in no way liable for the injury.

We will not, therefore, burden this Honorable Court with an enumeration of the unbroken line of authorities (for more than fifty years) which support the jurisdiction of admiralty in a case such as the present one.

We respectfully submit that there is no diversity of decisions upon the jurisdictional question involved in this case, and that this Honorable Court should deny the writ, as prayed.

JOHN E. SEMMES, JR.,

Of Counsel for Respondents.

SEMMES, BOWEN AND SEMMES,

Counsel.



Supreme Court of the United States

October Term, 1913

No. 175

ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA

FRANK IMBROVER

No. 176

ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA

STATE OF MARYLAND TO THE USE OF MARY
SZCZESER, WIDOW OF MARTIN SZCZESER,
ET AL.

ON CERTIORARI FROM THE CIRCUIT COURT
OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PETITIONER.

NICHOLAS P. BOND,
RALPH ROBINSON,
EDWARD DUFFY,

Counsel for Petitioner.

WING BROTHERS, 1 PRINCE STREET, BALTIMORE, MD.

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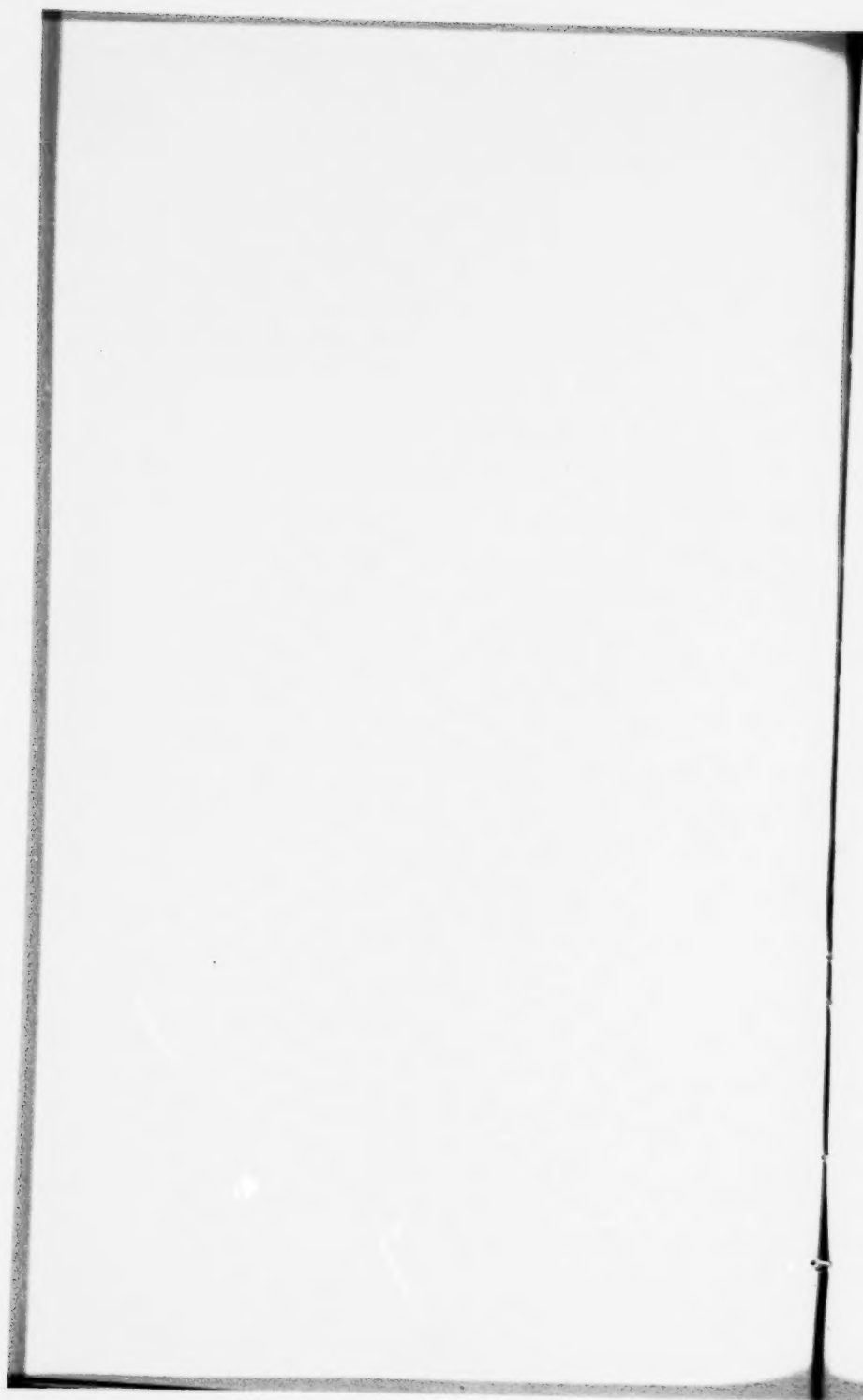
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Supreme Court of the United States

OCTOBER TERM, 1913.

No. 215.

ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA.

vs.

FRANK IMBROVEK.

No. 216.

ATLANTIC TRANSPORT COMPANY
OF WEST VIRGINIA

vs.

STATE OF MARYLAND TO THE USE OF MARY
SZCZESEK, WIDOW OF MARTIN SZCZESEK,
ET AL.

BRIEF FOR PETITIONER.

STATEMENT OF FACTS.

The Steamship "Pretoria," belonging to the Hamburg American Steam Packet Company, arrived in port not later than Saturday prior to the Monday on which the accident happened. The evidence does not show however on what day she did arrive.

THE HATCHES.

The hatch openings measured thirty feet fore and aft, and sixteen feet athwartship. Across this opening were placed two heavy iron beams running athwartship, each of these beams weighing about 1600 pounds. These beams fitted in sockets on the hatch combing. Through the end of each beam was a hole with a corresponding hole in the hatch combing, through which holes bolts could be placed, which would make the beam immovable. These beams were placed ten feet apart, thus dividing the hatch opening into three equal sections or spaces, each ten feet by sixteen feet. Across each of these openings were placed the fore and afters, made of wood, such resting on small projections on the beams. On the fore and afters were placed the hatch covers.

THE LOADING APPARATUS.

This consisted of the winches on deck and the booms rigged with pulleys. Through the pulleys ran a rope, one end of which wound around the winch while to the other end there was attached a hook with a lip to it. The load to be lifted was placed in a net or mat, which was hung on the hook by means of shackles. This net consisted of two mats of tarred rope laid face to face, each about five feet square and about six inches thick. The net was so arranged that when it hung on the hook loaded, it spread out, but when it was empty, it folded up like a book. When so folded, it was five feet long and about one foot thick.

THE STEVEDORES AND THEIR DUTIES.

Imbrovek and Szczesek (hereafter referred to as libellants), were stevedores in the employ of the Transport Company, a corporation, carrying on the stevedoring business and each of them was a leader or sort of sub-foreman. When the ship came in, and as soon as the custom officials were through with her, the stevedores took possession of her, as

was the custom. Bartholl, the head foreman, sent on her various gangs of stevedores, each under a foreman or gang boss. It was the duty of each gang to take possession of a hatch and remove the covers, fore and afters, and beams to such extent as it deemed necessary. In doing this, if the bolts were in they would remove them, if they so desired, and place them alongside of the combing, to be collected by the ship's carpenter. If thereafter the stevedores wished these bolts, they would call on the ship's carpenter for them. Each gang consisted of a foreman, two winchmen and a signal man, who were placed on deck, and of nine men in the hold, eight of these men in the hold attended to the loading, and were stationed four on each side of the ship. One of each four was a leader of his particular part of the gang. The ninth man in the hold was the net man, his sole duty being to hook and unhook the net and to steady it as it would go on its upward journey. Lenk was the foreman of the gang to which the libellants belonged, and each of the libellants was a leader.

THE METHOD EMPLOYED.

At the time of the accident, the gang was loading the ship with only the centre section of the hatch uncovered. The beams were in and not bolted. The fore and afters and hatch covers of this section were piled on the other two sections. On Saturday prior to the accident, and all day Monday, Bartholl had a gang working through this centre section with the covers similarly situated, but there was no evidence to show whether the bolts were in or not.

THE ACCIDENT.

A loaded net had been lowered and unhooked when the net man hooked on an empty net and gave the signal to go ahead. As the net went up, it, in some way not shown by the evidence, caught on the projection in the athwartship

iron beam, on which projection the fore and after was intended to rest, jerked the beam out of its sockets, and the beam, together with the fore and afters and hatch covers which it supported, fell to the hold below, thus injuring Imbrovek and Szczesek. The latter afterwards died. The accident happened about ten o'clock P. M. The gang to which the libellants belonged had gone on duty at 6 P. M.

WHAT HAPPENED AFTER THE ACCIDENT.

After the accident the mate of the ship, together with Weber and Mayerowicz, two of the stevedores, went below to look at the beams, when this conversation took place : The mate said :

"Look, there is nothing the matter with this beam. The beam is all right, because maybe the Company is going to blame us, the ship, and you see now it is not our fault."

Weber said :

"If that cross beam was bolstered, it would not have come out," and the mate said :

"Yes, you are right, but if the foreman had let me know I would have sent the carpenter and put the bolts in, and in that way they would never have come out ;"

and then Weber said :

"You had charge of that ;"

and the mate said :

"No, we did not know what section the stevedore was going to take out ; they can take out the cross piece if they want to. We have nothing to do with that."

THE CAUSE OF THE ACCIDENT.

There was no evidence to show how the net came to catch on the projection, but Bartholl, the head foreman, who was not on duty or present on the ship at the time of the accident, testified that he had been stevedoring 17 years, and

that the net was so made that it could not have caught unless the net man had permitted one of the shackles to hang loose instead of putting it on the hook; that in his opinion the net man had allowed one of the shackles to hang loose, and this shackle had caught on the projection. That even in such a case the net could not have caught had the net man steadied it.

LACK OF EVIDENCE.

There was no evidence to show when the bolts had been removed, or which particular stevedore or gang of stevedores had removed them, or to show that the libellants were not experienced workmen, or that they needed instructions of any kind as to the dangers of the work. The evidence in fact showed that Imbrovek had been stevedoring nine years. There was no evidence to show what were the duties of Bartholi, other than those which might be assumed from the facts that he was head foreman; that he had sent the various gangs on board after the arrival of the ship, and that he had a gang in the hatch working on Saturday and all day Monday. There was no evidence to show what were the duties of Lenk, the foreman of the gang to which the libellants belonged, other than that what might be assumed from the fact of his being foreman. There was no evidence to show whether the Transport Company had issued any instructions to its employees as to the method of doing the work or whether they were not to work with the beams in, unless bolted. There was no evidence to show that there was anything wrong with the construction of the ship or her condition at the time of the accident.

There are seventeen assignments of error (Imbrovek, Record, p. 99-101), but the principal ones are, that it was error—
 (a) to hold that admiralty had jurisdiction;
 (b) to hold that the accident happened by reason of the negligence of the Transport Company.

ARGUMENT.

POINT I.

Admiralty has not Jurisdiction.

The first question is : Has a Court of Admiralty jurisdiction over a case brought by a stevedore against his employer for the negligence of the employer in failing to furnish the stevedore a safe place in which to work, where the work is being done on board a steamship tied to a pier, the stevedore having no contratural relation with the steamship, her master or owner ?

The United States Circuit Court of Appeals for the Fourth Circuit in this case holds that a Court of Admiralty has jurisdiction, and while the Court of Appeals rendered a *per curiam* opinion herein, we must assume that its reasons were the same as those set forth by District Judge Rose in the opinion filed by him.

The United States Circuit Court of Appeals for the Ninth Circuit in *Campbell vs. Hackfeldt*, 125 Fed. 696, holds that admiralty has not jurisdiction. The reasons for this holding will be found in the opinion of that Court delivered by Judge Ross.

Judge Rose says (Record p. 88) : "Jurisdiction over torts depends on locality and not on the nature or origin of the wrong done." And again (Record p. 92) : "It would seem that such a tort is clearly maritime. If maritime, it is in any event, and under any general theory of jurisdiction, within the cognizance of a Court of Admiralty."

The first question which we will, therefore, discuss is :

A.

Is locality the sole test of jurisdiction, that is to say, is every tort which is committed on navigable waters cognizable in admiralty solely because it was so committed ?

No doubt there are many expressions by Federal Judges which would lead one to suppose so, if such expressions are disassociated from the facts of the case being decided. Let us suppose, that on a steamer while plying the Potomac River one passenger slanders another. Has admiralty jurisdiction in the case? If it has, then everything said in this brief on the jurisdiction of that Court is worthless. If it has not, then there is room for the contention herein made. Justice Storey rendered his masterly opinion in *De Lovio vs. Boit*, 2 Gall. 399 in 1815. He states (399-404) that the Admiralty Court is of a very high antiquity; that it has been distinctly traced from the time of Edward I; that the original nature and extent of its jurisdiction cannot now with absolute certainty be known, as it is involved in the same obscurity as the original jurisdiction of the Courts of Common Law; that the admiralty of England and the maritime Courts of all the other powers of Europe were formed upon one and the same common model, and that their jurisdiction included the same subjects as the consular Courts of the Mediterranean, as described in the *Consolato del Mare*. The learned Justice then traces the early history of this jurisdiction through the Black Book, the laws of Oleron, the ordinances passed in the reigns of King John and Edward I, and with regard to the Black Book he states:

"It contains an ample view of the crimes and offenses cognizable in admiralty, and also occasional ordinances and commentaries upon matters of prize and maritime torts, injuries, and contracts."

He sets forth (p. 400) the jurisdiction of the Consular Courts as described in the *Consolato del Mare*, and it is to be noted that no jurisdiction as to torts is mentioned, but the broadest jurisdiction as to contracts of a maritime nature is given.

The original Black Book was found after the first volume of Twiss was issued. It is divided into five parts: Nos. A, B, C, the Laws of Oleron, and No. D. It was compiled not earlier than the reign of Henry VI. There are documents in it which were drawn up antecedent to the reign of Edward III, Nos. A and B are attributed to the early part of the reign of Edward III, No. C contains ordinances which purport to have been made in the reign of Henry I, Richard I, John and Edward I; the laws of Oleron were first used in England in the reign of Edward II (3 Twiss, Black Book of Admiralty, pp. IX-XI).

The contents of Part A (1 Twiss, p. 3) are described (1 Twiss, p. XLII) as concerning the administrative duties of the admiralty in time of war.

The contents of Part B (1 Twiss, p. 24) are described (1 Twiss XLIII) as ordinances for the government of the admiral in the enemy's country and rules for the maintenance of naval discipline at sea before arriving in the enemy's country.

The contents of Part C (1 Twiss, p. 40) are described (1 Twiss, p. XLIV-LVII). By an inspection of Part C it will be found that it deals with crimes and offences as a general rule, but it contains some matters of interest herein.

Sections 4 and 5 (p. 45, 47) make a person cutting the cable or removing the anchor of a ship responsible to the owner if the ship is thereby lost.

Section 21 (p. 69) which is the ordinance passed by Edward I at Hastings, provides that any contract made between merchant and merchant or merchant and mariner beyond the seas or within the flood mark shall be tried before the admiral, and nowhere else. (Twiss states in a note that this would seem to be the true starting point of admiralty jurisdiction in civil suits). Section 31 p. 83 provides for a fine on persons suing at common law any merchant, mariner or other person for anything of ancient right belonging to maritime law.

The origin of the Law of Oleron (1 Twiss, p. 89) is described (1 Twiss, p. LVII). By an inspection of these laws it will be found that the only torts therein mentioned are collisions, (Section 15, p. 109) damage to one ship by the anchor of another (Section 16, p. 111) and the negligence of a pilot (Sections 33 and 34, p. 127-129), and it is interesting to note that Section 6 (p. 95) provides that if a mariner is injured in the service of a ship he is to be healed at the cost of the ship.

Part D (1 Twiss, p. 133) is the inquisition taken at Queensborow in 1375. This inquisition deals almost entirely with wages of mariners, whereas the addition to this inquisition (1 Twiss, p. 149) which was adopted in the reign of Henry IV or thereafter (1 Twiss, p. LXXI) deals with various crimes and offenses and not with torts.

Sections 51 and 52 (p. 163) of this inquisition are interesting herein. They provide that inquiry be made concerning those who sue at common law for a thing belonging of *ancient right* to the maritime law and concerning judges who hold pleas of *right* belonging to the admiralty Court.

It will, therefore, be noted that all of these ancient documents just discussed deal to a very limited extent with torts, and that the torts with which they do deal are in every case in their nature maritime.

There is one fact, however, which must be kept in mind in order to understand the English decisions. We refer to the venue. In a common law Court, locality was the basis of jurisdiction. The judge was a county judge and the venue had to be laid originally in the hundred and later in the county where the cause of action arose, and the jury which tried the case must come from that county. In the earliest time all causes of action were local. In the course of time, however, there crept into the law from necessity the distinction between local and transitory actions. Thereafter a transitory action could be brought where the defendant was

found, but in order to get jurisdiction over a foreign transitory action a fiction was finally devised under which the action must be stated to have arisen in its true locality, to which was added under a *videlicet*, the place where the action was brought, and this latter statement could not be traversed. To such an extent was this carried, that if a suit were brought at common law for the seizure of a ship on the high seas, the pleading stated that the ship was taken on the high seas, to wit, at Cheapside in London, and the defendant was not allowed to prove that Cheapside was not on the high seas.

Bacon's Abridg. "Actions Local and Transitory."

McKenna vs. Fiske, 1 How. 240, 247.

R. vs. Keyn, 3 Ex. D. 63, 162.

Westyn vs. Fabrigas, 1 Smith L. Cases (11 Ed.) 591.

Gilbert's Practice (3 Ed.) 84-85.

British South Africa Co. vs. The Companhia, etc.,
Appeal Cases (1893), 602, 617, 631.

Twiss states (Vol. 4, p. VII) that a Court sat in the borough of Ipswich from tide to tide to administer the law maritime to passing mariners, as early as the reign of King John (A. D. 1200), and no doubt this Court tried all causes of action which arose without the bodies of counties or in foreign lands irrespective of their nature, for otherwise there was no Court which had jurisdiction, and so it is that we find Edward I. at Hastings by that statute referred to by Justice Story (page 402) declaring every contract between merchant and merchant or merchant and mariner beyond the sea or within the flood mark shall be tried before the admiralty and not elsewhere, thus attaching to the maritime jurisdiction of the admiralty a jurisdiction over suits on contracts which at that time were probably not cognizable in a common law Court. The date when this fiction was adopted seems to be involved

in doubt, but there is some evidence that it was in existence in the time of Edward III (*Skinner's Case*, 6 State Trials 712, 719) and also in the time of Edward I, as hereinafter pointed out. Over this class of cases, however, Justice Storey states (p. 442) that admiralty did not claim jurisdiction *as of right*, and it is also said that admiralty would have no jurisdiction over a loan made by a captain to his passenger on his private account, or over a contract of marriage made on shipboard (2 Browne Ad. 1 Amer. Ed., p. 94-95); that is to say, admiralty never claimed *as of right* jurisdiction over contracts which were not in their nature maritime, and admiralty never raised complaint against the common law when it took jurisdiction over such contracts by the fiction aforesaid, and there is no reason to suppose that the same position would not have been taken as to torts not in their nature maritime, although admiralty at one time had jurisdiction over such torts *as of necessity*. Nor is it necessary here to show that admiralty would have refused jurisdiction in a case of a tort not of a maritime nature, for the Courts in those early days were fighting from the standpoint of fees and perquisites, and we, therefore, find that notwithstanding the fact that admiralty did not claim *as of right* the jurisdiction over non-maritime foreign contracts under the Statute of Edward I at Hastings, yet we find the admiralty contending for such jurisdiction as late as 1575 and 1632, as is shown by the agreements of those years between the admiralty and common law (Benedict's Admiralty 4th Ed., p. 39, 46), and so likewise, admiralty may have contended for jurisdiction over a non-maritime tort. But by Section 4 of the agreement of 1632 between the admiralty and the common law (Benedict's Admiralty p. 47) it was provided "likewise the admiral may require of and redress all annoyances and obstructions in all navigable rivers beneath the first bridges that are any impediments to navigation or passage to and from the sea, and also try personal contracts

and injuries done there, which concern navigation upon the sea and no prohibition is to be granted in such cases."

So that here at least there is some evidence that admiralty, notwithstanding the fact that it, at one time, from necessity, had jurisdiction over torts not of a maritime nature, and ceased claiming such jurisdiction, and had limited its jurisdiction to torts of a maritime nature. And Judge Winchester of the Maryland District in 1801 said that neither the judiciary act nor the Constitution limit the admiralty jurisdiction as to place, and that it is bounded only by the nature of the cause.

Storers vs. The Sandwich, 1 Pet. Ad. Dec. 233.

Nor could there be any contention today that the District Court has jurisdiction over a non maritime contract made beyond the seas or within the flood mark merely because the admiralty once had jurisdiction of necessity over such, for the Constitution limits the jurisdiction to such causes as are maritime, and for the same reason the District Court would not have jurisdiction over a tort not of a maritime nature.

We, therefore, submit that the jurisdiction, as of right, of the admiralty was limited to causes of a maritime nature and that it was only this jurisdiction which was granted to the Federal Courts.

It has been assumed by many judges that the decision of Justice Story in *De Lovio vs. Boit* takes a position contrary to what we are here contending for, and we will, therefore, discuss that opinion.

Evidently after the establishment of the fiction above referred to as to venue, the Common Law overstepped its rightful jurisdiction by taking jurisdiction of maritime cases by the use of the fiction, for we find as early as Edward I the Common Law taking jurisdiction of a case for the seizure of a ship on the high seas, and laying down the rule that it

had power to take cognizance of a thing done as well upon the sea as upon the land (*DeLovio vs. Boit*, 414-417), and that in the time of Edward III it took jurisdiction of an action against the master for embezzlement by the mariner (*Malloy de Jure* Book II, Ch. III, Section XVI). At the same time, however, the skirts of the admiralty were not clear in this regard, for it likewise in turn "encroached upon other jurisdictions and usurped that which did not belong to it" (*Benedict*, s. 58).

In consequence of this encroachment, two statutes were passed in the reign of Richard II, under the construction of which a contest between the Admiralty and the Common Law arose, which lasted for two centuries, and only ended when the jurisdiction of admiralty was confined to contracts of a maritime nature, made upon the sea, and to be there performed, and to contracts which the Common Law admitted could be best enforced in admiralty, such as marine hypothecations and those for seaman's wages (*DeLovio vs. Boit*, 452-463). In seizing the jurisdiction of the Admiralty the Common Law Courts applied the fiction referred to, and while the contest has generally been ascribed to the jealousy of Coke, this jealousy was only the jealousy of the English people, who thought, whether rightfully or wrongfully, that complete justice could only be gotten before a jury of twelve men.

We will now take up these statutes of Richard II and endeavor to show that under their construction the question of locality was asserted by the Common Law as the test of its jurisdiction, irrespective of the nature of the cause, and that all Justice Storey is contending for in *DeLovio vs. Boit* is, that the nature of the cause is the sole test.

It was provided (13 Rich. II, Chapter 5) :

"That the admirals and their deputies shall not meddle henceforth of anything done within the realm, but only of a thing done upon the sea, according as it

hath been duly used in the time of the noble King Edward III, Grandfather of our Lord and the King that now is."

And it was further provided (15 Rich. II, Chapter 3):

"That of all manner of contracts, pleas and quereles and of all other things done or arising within the bodies of counties as well by land as by water, and also of wreck of the sea, the admiral's Court shall have no manner of cognizance, power nor jurisdiction, etc."

The first of these Statutes gives admiralty jurisdiction of things *done upon the sea* as distinguished from things done within the realm, and the second, takes from it jurisdiction of things *done or arising within the bodies of counties as well by land as by water*.

It was contended by the admiralty that these statutes were not intended to limit its rightful jurisdiction, but to restrain a wrongful jurisdiction.

It was contended by the law (and this contention was enforced), that it was not the ebb and flow of the tide which determined jurisdiction but the high seas; that admiralty had no jurisdiction over a tort committed within the body of a county, although committed within the ebb and flow of the tide; that it had no jurisdiction over a contract unless it was made and to be executed upon the high seas.

Thus we see that the contention was not as to whether admiralty had jurisdiction over *all torts committed on the water* but whether it had jurisdiction over *torts committed on one part of the water as distinguished from another*.

Justice Storey had before him the question as to whether admiralty had jurisdiction of a contract of marine insurance under the constitution granting to the Federal Courts cognizance "of all cases of admiralty and maritime jurisdiction." He went into the history of the admiralty jurisdiction from

the earliest times. He had before him the question as to whether the grant should include the original jurisdiction of admiralty, or whether the jurisdiction was to be limited to "things done upon the sea," as those terms had been construed under the Statutes of Richard, the question as to whether that jurisdiction was to be limited to contracts made upon the sea, as distinguished from those made upon the land, but to be performed upon the sea. He took up, however the jurisdiction over torts. The question here that he was discussing was not whether it had jurisdiction over all torts committed on the water, but whether it had jurisdiction over torts committed within the body of a county and at the same time within the ebb and flow of the tide, as distinguished from torts committed on the high seas. He says (p. 465):

"Considerations and consequences like those which have been mentioned cannot but forcibly impress every one who has examined this subject with accuracy and diligence, and lead to the conclusion (adopted by Dr. Browne) that the jurisdiction of the admiralty depends, or ought to depend, as to contracts upon the subject-matter; *i. e.*, whether marine or not, and as to torts upon locality, *i. e.*, whether done upon the high sea or in ports within the ebb and flow of the tide or not."

Again he says (p. 474):

"On the whole I am without the slightest hesitation ready to pronounce that the delegation of cognizance of "all civil cases of admiralty and maritime jurisdiction" to the Courts of the United States, comprehends all maritime contracts, torts, and injuries. The latter branch is *necessarily* bounded by locality; the former extends over all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation business or commerce of the sea."

What the learned judge, therefore, held was that admiralty had jurisdiction over maritime contracts and over maritime torts; that the former was not determined by locality, because a maritime contract could be executed either on the land or the sea; that the latter was determined by locality because no tort could be maritime unless done on the sea within the ebb and flow of the tide.

The fact that the nature of the cause, whether contract or tort, is the true test has been lost sight of in many decision, because of the contest which was waged for so many years on the question of locality. There was never any contest waged as to the nature of a tort, because admiralty never claimed to have jurisdiction over a tort committed on land. The contest here was whether admiralty had jurisdiction over torts when committed on navigable waters, or only when committed on a part of these waters. Justice Story held that locality (navigable waters) was the test. As to contracts, admiralty claimed jurisdiction when it was of a maritime nature, whether made on land or within the ebb and flow of the tide, and the question here was whether the jurisdiction was not limited to contracts of a maritime nature made and to be performed on the high seas.

That this is the construction which has been put upon Justice Story's opinion and those which have followed it by this Court is shown by two cases in this Court.

We refer to

The *Blackheath*, 195 U. S. 361 ;

Martin vs. West, 222 U. S. 191.

In each of these cases a structure built up from the bottom in navigable waters was injured by reason of a ship colliding with it. Such a structure is a part of the reality.

The Court says with reference to such a tort, that it was begun and consummated upon navigable waters (195 U. S. 367).

If locality, therefore, is the sole test of jurisdiction and the nature of the tort is not to be taken into consideration, admiralty would have jurisdiction in the case of such a collision.

It will be found, however, that the question of jurisdiction turns on the nature of the damaged structure. If that structure is a beacon, then the tort is of a maritime nature and admiralty has jurisdiction. But if the structure is the pier of a bridge, then the tort is not of a maritime nature and admiralty has not jurisdiction.

In *Martin vs. West* this Court has said that the question as to whether or not a tort is of a maritime nature must be resolved according to the locality and the nature of the injured thing; and the English Court has said that in determining whether a tort is maritime or not we must consider three things: Locality, subject-matter of complaint, and person with regard to whom complaint is made.

The Queen vs. The Judge of the City of London,
1 Q. B. (1892) 273.

So that given the locality on navigable waters the jurisdiction of admiralty does not necessarily attach unless the tort is of a maritime nature.

It is therefore, submitted that locality is not the sole test of jurisdiction, and that the tort in question in this case, although committed on a ship lying in navigable waters, is not of admiralty cognizance, unless it be of a maritime nature.

B.

Is the tort of a maritime nature?

The jurisdiction of the admiral was exercised through the prerogative of the King just as was the jurisdiction of the Courts of Common Law. The law or custom enforced by the admiral, however, did not originate and expand within the confines of a particular country, but originated from the

necessities of shipping and expanded among the maritime states and nations. Its beginning must have been nearly coincident with the beginning of commerce on water, and it is to a great extent international. The Black Book is a collection of these laws and customs. We believe that we have noted in this brief all the torts which are mentioned therein as within the jurisdiction of admiralty.

They are as follows :

(1) Negligent collision between ships. The ship is personified, at least under the modern cases, and it can injure and is responsible for the injury irrespective of whether or not it is being navigated by its owner. The modern cases refuse jurisdiction in the case of a collision of a ship with a bridge or wharf, although the latter is used for commerce on water (*Cleveland T. & V. R. R. vs. Cleveland S. S. Co.*, 208 U. S. 316 ; *Martin vs. West*, 222 U. S. 191).

(2) Collision with an anchor of another ship. This is nothing but the modern doctrine of jurisdiction in cases of obstruction to navigation. Admiralty has always had within its jurisdiction the regulation of navigation. It looks after both obstructions to navigation and aids to navigation. It enforces a claim for damages whether arising from a submerged pile (*Phila., W. & B. R. R. vs Philadelphia, etc., Co.*, 23 How. 209) or from an unlawful structure in the water (*Atlee vs. Packett Co.*, 21 Wall. 389). It likewise enforces a claim for damages to an aid to navigation done by a ship (*The Blackheath*) and would probably enforce such a claim when the damage is done by an individual.

(3) Damage to a ship by the negligence of its pilot. The English Court has refused to extend this jurisdiction to a claim for damages to one ship by the negligence of the pilot of another (*Queen vs. Judge of the City of London*).

(4) Injury to a ship by reason of some one removing the anchor or cutting the cable.

(5) Injury to a mariner in the service of the ship.

In such case the ship was liable whether negligent or otherwise only for the maintenance and care of the mariner. This is the rule today, except where the injury happens by reason of the unseaworthiness of the ship or of a failure to supply and keep in order the proper appliances appurtenant to the ship (*The Osceola*, 189 U. S. 158), in which event the mariner is entitled to damages. The modern cases have brought within this jurisdiction an injury to a person lawfully on board a ship caused by the negligence of the ship (*Leathers vs. Blessing*, 106 U. S. 626), and to a stevedore injured by the negligence of the ship (*The Max Morris*, 137 U. S. 1). But the modern cases have refused jurisdiction when the negligence of the ship operates injuriously to a structure on land (*The Plymouth*, 3 Wall. 20).

In all of these torts cited from the Black Book as within the jurisdiction of admiralty, there is present either an injury to a ship caused by the negligence of a ship or the negligence of a person, or an injury to a person caused by the negligence of a ship, and the modern cases have not extended this jurisdiction, but on the contrary have refused to extend the jurisdiction to the negligence of a ship operating harmfully to a structure on land whether by collision or otherwise. Therefore, a tort of a maritime nature is a tort arising out of an injury to a ship caused by the negligence of a ship, or a person or out of an injury to a person by the negligence of a ship. Therefore, there must either be an injury to a ship or an injury by the negligence of the ship, including therein, of course, the negligence of her owners or mariners.

There was no negligence of the ship in the present case. The tort is, therefore, not of a maritime nature.

The lower Court felt that the adoption of the doctrine of the nature of a tort as fixing the jurisdiction as distinguished from the doctrine of locality would produce serious difficul-

ties. We feel to the contrary. The doctrine of locality has produced endless difficulties, as witness the discussion of the two ladder cases: The *Strabo*, 90 Fed. 110, and the *H. S. Pickands*, 42 Fed. 239, and the discussion as to whether if a sailor falls from the yard arm by the negligence of the ship the jurisdiction would depend on whether he fell into the water and was drowned, or fell on the wharf and was killed. Indeed, Justice Brown has pointed out the difficulties of the locality doctrine in an article in 9 *Columbia Law, Rev.* 1.

The Court below was of opinion because admiralty had jurisdiction over crimes committed on navigable waters, it should also have jurisdiction over torts there committed. The jurisdiction over crime is, however, one of necessity.

No Grand Jury at Common Law could indict for murder done outside the body of a county, and no Court could punish for such a crime other than a Court of Admiralty. It was for this reason alone that the ancient maritime customs committed such crimes to the admiral.

As a result of the *Hackfeld* case and this case three articles have been written which may aid this Court in the determination of the question of jurisdiction. We refer to—

16 *Harvard Law Rev.* 210.

18 *Harvard Law Rev.* 299.

25 *Harvard Law Rev.* 381.

POINT II.

The Master Did Not Fail to Furnish a Safe Place. The Place Was Made Unsafe by the Method of Operation, and Did Not Arise from the Construction of the Place.

The question which we are now about to discuss is raised by our Assignments of Error Nos. 3, 11, 13, 15, 16 and 17 (*Imbrovek Record*, pp. 99-100). The contention of the libellant is, that it is the duty of the maser to exercise reasonable

care to furnish a reasonably safe place in which the servant is to work, and that this duty is non-delegable. With this we agree.

R. R. vs. Baugh, 149 U. S. 368, 386.

He further contends, however, that the fact that the pins were not in place, and that the accident could not have happened if they had been, is sufficient evidence of the non-performance of this duty. We submit that it is not. Our contention is, that the evidence fails to show that the master did not perform its duty in furnishing a safe place; that the sole effect of the evidence is to show that a place which we are warranted in assuming safe, was made unsafe by the servants who was permitted to do the work in his own way and who selected an unsafe method, notwithstanding the fact that the master had placed at his disposal every appliance which, if used, would have made the method safe. That the lack of safety was not in the place except in so far as the place was made unsafe by the method employed in doing the work. That for this lack of safety the master is not responsible. That the "safe place" doctrine only applies to construction and not to the method of operation.

In discussing this question, we assume that one of the recognized uses of the pins was to prevent accidents such as that which happened. (See error No. 2.)

Let us go back to the time the ship arrived in Baltimore. This was at least two days before the accident happened. It was then the master took possession of the ship, and the various gangs were placed on board. Just exactly what was the condition of the ship as to the pins and the hatch covers at that time there is no evidence to show. The ship was prepared for unloading, however, and it appears that the unloading at the hatch in question was done through the centre section on Saturday and Monday. Whether the pins were in or out at this time we do not know, and as far as the evi-

dence shows it might have been perfectly safe at this time to unload without the pins and with the hatch partly covered, because the net may not have been in use. Whether this be so or not, inasmuch as there is no complaint as to the construction of the ship, or as to the sufficiency of her booms, tackle and other apparel, we can assume that it and they were in good condition. She was, therefore, upon her arrival, a safe place in which to work. If thereafter she became unsafe, it must have occurred from something that the servants did or omitted to do. It must have occurred from the method employed by them.

Let us now come to Monday at 6 P. M. It was then that the gang to which the libellant belonged came on board, relieving the day gang. They were expected to load the ship with copper. They found the hatch covers on except those over the centre openings. Whether they found the pins in or out we do not know. If they found the pins in, the gang boss must have ordered them out, and if they found them out, the gang boss must have decided that he desired to work with them out, but they were there for use if desired. He must also have decided to work with the hatch partly covered, so that it is perfectly plain that the place where the libellant worked as far as danger is concerned was made dangerous by the failure of the boss to do or not to do something. In other words, the accident happened not by reason of any inherent danger in the place arising from a faulty construction of the ship, but because of the method pursued by the servant, the servant selected an unsafe method when the master had furnished him with all the appliances to make it safe. Under such circumstances the negligence was the negligence of the boss, and as the boss and the libellant were co-servants, the master is not liable.

If the lower Court is right, then the master cannot delegate to a boss the method of unloading, but he (the master) must be ever present to say whether a particular method em-

ployed at a particular time is proper. We submit that this is not the correct rule. We submit the following authorities as bearing us out in these contentions :

- 2 Bailey Personal Injuries*, Sec. 2885 and 2993 ;
- Kelly vs. Norcross*, 121 Mass. 508 ;
- Martin vs. R. R.*, 166 U. S. 399 ;
- Brown vs. People's Gas Light Co.*, 81 Vt. 477 ;
- Kelly vs. New Haven Steamboat Co.*, 74 Conn. 343 ;
- Tilly vs. Rockingham, etc., & Co.*, 74 N. H. 316 ;
- Hussey vs. Cogger*, 112 N. Y. 614 ;
- Hogan vs. Henderson*, 125 N. Y. 774 ;
- The Queen*, 40 Fed. 694 ;
- Cleveland vs. Railroad Co.*, 73 Fed. 970 ;
- The Picqua*, 97 Fed. 649 ;
- Kelly vs. Jutte & Foley Co.*, 104 Fed. 955 ;
- McDonnell vs. Oceanic Steam Nav. Co.*, 143 Fed. 480 ;
- American Bridge Co. vs. Secas*, 144 Fed. 605 ;
- Westinghouse vs. Callaghan*, 155 Fed. 397.

In 2 Bailey on Personal Injuries, the rule is stated as follows :

Sec. 2885 : "It is the duty of the master to provide and maintain for his servants a reasonably safe place for the doing of their work.

Sec. 2993 : This rule has no application to premises made unsafe by the negligent manner in which the fellow-servants are performing their work."

In 81 Vt. 477, the plaintiff was injured because the trench in which he was digging was not shored, although timbers were provided by the master for that purpose.

It will, therefore, appear that the place in which the workman was injured was rendered unsafe by reason of the way in which the work was done, notwithstanding the fact that the master had furnished materials to render it safe.

The Court says, page 480 :

"Among the non-delegable duties which a master owes his servant is that of providing and maintaining a reasonably safe place in which to work. But this rule does not require the master to supervise the merely executive details of the work as it goes along. These are acts of service and are within the proper range of the servant's duties. They may be delegated to a competent co-servant, and when so delegated, negligence therein, though resulting in injury, will not support an action against the master. And it matters not whether the offending servant be a foreman, overseer, superintendent, or a mere fellow workman ; the result is precisely the same—the master is not legally responsible—for it is the character of the act in question which determines. So it is that when a master provides his servant with suitable materials and instrumentalities to make safe the place, and a competent foreman to use and apply them, he fully discharges his legal duty, and the negligence of the foreman in the manner in which the appliances are used, or in failing to make use of them at all, will not establish liability on the part of the master."

The Court again says on page 484 :

"Some time the same result is reached in such cases by saying that the safe-place rule does not apply where the prosecution of the work itself makes the place and creates its dangers. But it seems to us more logical to put the case upon the broad ground that the master has fully complied with the safe-place rule when he has provided against such dangers as may reasonably be apprehended by furnishing the servant with the means of protecting himself."

In 74 Conn. 343, an accident arose by reason of the failure to use a fender (which had been provided by the master)

while docking a vessel. The mate's duty was to employ the deck hands and to determine whether it was necessary to use the fender. The plaintiff was a deck hand and it was their duty under the orders of the mate to assist in docking.

It was contended that the master had not furnished a safe place. On page 347, the Court says :

"It (the defendant) had furnished a sufficient fender and a place in which it could be used, and it kept the fender in a proper and convenient place at all times ready for use. In doing this it had performed its full duty in this respect. It was not obliged to be there every time the boat was docked to use the fender, or to see to it that it was used. It was the duty of the defendant to furnish the appliances ; it was the duty of the servants to use them when necessary. When the owner of a vessel furnishes proper guard rails, gang planks and hatch covers for the use of the crew, we know of no case that has gone so far as to hold that he is liable to one of the crew for the negligence of a fellow servant. In leaving the guard rail down, the hatchway uncovered or the gang plank insecurely fastened, such negligence are incidental to the use by the crew of the appliances furnished by the master, and the only way the master is required to guard against them is to appoint a sufficient number of competent servants. Our conclusion is that the Court below erred in holding that the defendant was liable for the negligence of the mate upon the facts in this case."

In 74 N. H. 316, the plaintiff was engaged in cleaning out a gas main under the direction of a foreman who had charge of the defendant's gas department. The main was provided with valves, which, if closed, would cut off the flow of gas through the main. It was contended that through the neglect of the foreman to close these valves an explosion occurred which injured the plaintiff.

The Court says, page 318 :

"But the plaintiff says in argument that the failure to close the valves and the consequent flow of gas in the pipes rendered the place to which he was assigned an unsafe place for his work. The place was a portion of a structure designed for the manufacture of gas. So far as appears it was reasonably safe for that purpose. As previously stated, valves were provided for shutting the gas from the pipes whenever there was occasion for so doing. It does not appear that any special construction was required for airing the pipes. According to the plaintiff's allegations whatever want of safety there was in the place at the time of his injury was temporary, and was due to the failure to make proper use of the valves, or to properly air the pipes, or both. The defendants having provided proper appliances for securing safety to their employees were not chargeable with the non-delegable duty of properly operating them. They were at liberty to trust the operation of the appliances to any of their employees, provided only they exercised ordinary care in selecting the employees, and it is not contended that they failed in this respect in this instance. At best, so far as appears by the testimony, the acts required to secure safety of place were mere acts of service which the defendants might properly delegate to their employees."

In 112 N. Y. 614, the injured servant was working in the hold of the vessel, and was injured by the hatch covers falling on him, the facts being that the defendant exercised no personal supervision over the work, but devolved its whole management and control upon the superintendent, who was authorized to employ and discharge and to regulate and direct the manner of the work. The superintendent called to two men to lift the covers, and one lifted before the other

had hold. The consequence was that the hatch covers slipped and were precipitated on the men below.

The Court held the master not liable, saying (page 619) :

"This vessel was constructed in the usual and ordinary mode of such steamers, and there was nothing about the arrangement of the hatchways, their appliances or the various decks of the vessel which presented any danger if used in their usual and customary manner, to those employed about them."

And the Court says, on page 621 :

"It would be extending the liability of a master beyond any established rule to require him to oversee and supervise the executive detail of mechanical work carried on under his employment, and there is no rule of law which authorizes it."

In 125 N. Y., page 774, the stevedores had built a platform for the purpose of loading a vessel. It was negligently constructed, although the master had furnished proper material, which, if properly used, the accident could not have happened. The plaintiff was not allowed to recover.

The Court says :

"But the place which the master furnished was the ship itself, constructed in the usual way, and which became unsafe not by reason of any carelessness or negligent plan or manner of construction, as to which no contention is made, but solely for the way in which the longshoremen did their work."

In 104 Fed. 955, the accident happened because a derrick had not been properly bolted.

In deciding for the defendant, the argument being made that the master had not furnished a safe place, Judge Dallas says (page 957) :

"The sole complaint is that it was not properly bolted, but it certainly was intended that it should be, and the

bolts as well as the necessary mechanics and tools had been actually and adequately supplied."

In 144 Fed. 605, a bridge was being built by the use of false work, and there were large openings, the master had furnished sufficient lumber with which the openings could have been covered, if the workmen had seen fit to do so, and had also furnished a snub-rope to prevent a load, being drawn up on a pulley, from swinging, but the workmen omitted to use the snub-rope or cover the openings, in consequence of which, a load which was being drawn up, struck one of the workmen and knocked him through one of the open spaces. By reason of these omissions it was contended that the master had failed to provide a safe place.

It was held by Judge Sanborn that the master was not liable.

The Court says (on page 611):

"It is the duty of the master to use ordinary care to furnish reasonably safe machinery and instrumentalities with which his servants may perform their work, and a reasonably safe place in which they may render their services, and this duty may not be so delegated by him that he may escape liability for its breach. Nevertheless, this duty has its rational and legal limits. It does not extend to the guarding of the safety of a place or of a machine against its negligent use by the servants. The risk that a safe place will become unsafe, or that safe machinery will become dangerous, by the negligence of the servants who use them, is one of the ordinary risks of the employment which the servants necessarily assume when they accept it. *It is a risk of operation and not of construction or provision; and the duty to protect place and machinery from dangers arising from negligence in their use is a duty of the servants who use them, and not that of the master who furnishes them.*"

In 97 Fed. 649, the accident happened in a similar manner to the one in question, and the Court there held that it was due to the negligence of a co-servant.

So much the more will the doctrine enunciated in the above authorities appear applicable to the facts of this case, when it is remembered that there is no proof that the pins were intended to be used while the ship was being unloaded, nor to prove that Imbrovek and Szezeseck, who were leaders (R., p. 40), that is, sort of sub-foremen (R., p. 65), did not know that the pins were out, and when it may be, from all the testimony shows, that Imbrovek and Szezeseck removed, or helped to remove, the pins in question at the time the ship arrived in port.

The learned Court below says in his opinion (R., p. 95) that it is not important to determine whether Lenk, the gang boss, was a vice-principal or not, but he added that it seemed probable that he was.

We have assumed that the Court decided that he was, and have, therefore, assigned it as error. (See error No. 5.) It seemed to the Court probable for three alleged reasons: Because he had complete control of the work; because he had the power to employ and discharge the men under him, and because of the lack of supervision over him.

Now, it is most respectfully submitted that the learned Court erred in this, for in the first place, the evidence does not show that Lenk had any more control than any other boss whose duty it is to supervise a gang of workmen, and such control has never been held, to our knowledge, by the Supreme Court sufficient to make the boss a vice-principal. In the second place, Lenk did not have the power to discharge men (R., p. 64), or, rather, if he did, there is no evidence to show it, but if he could both employ and discharge, this was not sufficient to make him a vice-principal. In the third place, there is no evidence to show that there was any lack of supervision over Lenk (see error No. 6). We do not

know who was Lenk's immediate superior. Nor do we know what instructions, if any, had been given Lenk (see error No. 5). We, therefore, submit that Lenk was a co-servant of each member of his gang.

The learned Court below in his opinion (R., p. 96), says:

"The stevedore's sole witness, Bartholl, appears to have had entire charge of the work of loading and unloading. He at least appears to have occupied the position of vice-principal. The testimony at all events does not show what other human being acted for the corporate respondent."

We can not agree that Bartholl was a vice-principal (see error No. 7). The testimony shows that Bartholl was head foreman (R., p. 55). There is no testimony to show what his duties were, except what may be gathered from his statement, that he had a gang at work in the particular hatch on Monday (R., p. 60). Whether he meant by this that he had assigned a gang for that particular hatch, or whether he meant that he was foreman over a gang that was working there, we do not know. He further stated that when the ship first came in, he assigned to the various hatches various gangs of stevedores (R., p. 64). Whether he assigned Lenk or his gang to work on Monday night, we do not know. In all probability he did not, because his testimony is that he was not there (R., p. 59). So that the only evidence from which the Court could conclude that Bartholl was a vice-principal was from the mere statement that he had assigned the gangs when the ship first came in.

We submit that this was not sufficient evidence to warrant the Court in finding that Bartholl was a vice-principal (see error No. 7).

On this immediate question there are two important cases to be considered other than those already cited, many of which deal with the question as to whether the act of negli-

gence complained of was the act of a co-servant or of a vice-principal.

In *Alaska Mining Company vs. Whelan*, 168 U. S., p. 86, the facts were that the plaintiff was employed in the defendant's mine in breaking and preparing rocks for the chutes. He was ordered by the foreman of the defendant to break rock immediately above and over one of the chutes, and while so employed, the foreman drew, or caused to be drawn the gate at the mouth of the chute, over which the plaintiff was working, thereby causing the rock at the head of the chute to be drawn in, carrying the plaintiff with it in the chute.

Now, it will be perceived that the place where the plaintiff worked was a dangerous place only if operated in a dangerous manner, for the accident could not have happened had the plaintiff been notified before the door of the chute was opened. The Court held the master not liable, and in passing on the question as to whether or not the foreman is a co-servant of the plaintiff, said:

"Finley (the foreman) was not a vice-principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business, and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence *in using the machinery or in giving orders to the men.*"

In the case of *B. & O. Railroad Company vs. Baugh*, 149 U. S., page 368, the Supreme Court of the United States had before it the question as to whether or not an engineer who had control over firemen was for that reason a vice-principal, and, therefore, the company liable for an injury to the fireman arising from the neglect of the engineer.

The Supreme Court had previously decided that the conductor of a train was a vice-principal, and the Court undertakes to distinguish between the two cases, and in doing so, it lays down the following rules (pages 383 to 387):

Prima facie all who enter into the employ of a single master are engaged in a common service, and are fellow servants, and some other line of demarcation than that of control must exist to destroy the relation of fellow servants; that the master owes certain positive duties to the servant. These positive duties are to use reasonable care, to furnish a reasonably safe place, tools and machinery, and to furnish competent fellow servants; that if the master delegates these positive duties to an employee, that employee becomes a vice-principal. He stands in the place of the master, and the master is responsible for his negligence in performing these positive duties; that an employee in respect to other employees under him is a vice-principal, where the business of the master is separated into departments of service, and such employee is placed in charge of a separate department and given *entire and absolute* control over the same; that the question of liability turns rather on the character of the act than on the relations of the employees to each other; that if the act is one done in the discharge of the positive duties of the master to the servant then negligence in the act is negligence to the master, but that if the act be not one done in the discharge of such positive duties, then there should be some personal wrong upon the part of the master before he is held liable therefor.

Under the doctrine announced in these two cases, it is submitted that neither Lenk, the gang boss, nor Bartholl, the head foreman, were vice-principals, but that each of them was a co-servant with each member of the gang of stevedores, because neither had, so far as the evidence shows, entire and absolute control of any department of the master's business, and neither had been assigned by the master to perform one of its positive duties, and because even if Lenk had the right to employ and discharge, which the evidence does not show, that would not make him a vice-principal.

It is, therefore, respectfully submitted that the master did not fail in its duty to furnish a safe place.

POINT III.

Was the Failure to Use the Pins the Proximate Cause of the Accident, and the Consequent Injury and Death?

Let us suppose that the master was bound to see that the pins were in place. Even if this be so, the accident could not have happened, according to the undisputed testimony, had the net man properly hooked the net on, or had he steadied it, so that it would not swing (R., p. 59 and 60) (see error No. 12). Bartholl testifies that the net had been in use for at least seventeen years (R., p. 79); that ships are loaded seven out of ten times in the same way; that during all this time he had never heard of an accident happening this way (R., p. 69). While it is true, that so far as the testimony shows, the pins may have been in place on all the prior occasions, when there were pins, still it must often have happened during all these years that many ships were unloaded in the same way in which no pins or pin holes were provided.

The burden was on the libellant to prove a state of facts which would naturally lead to the conclusion that the injury was the natural and probable consequence of the failure to

use the pins. The only evidence on this subject was the evidence of experience. This omission had never previously caused the beams and hatch covers to be pulled out of place. This did not occur until the carelessness of a co-servant caused it.

Under such circumstances the negligence of the master in failing to use the pins was not the proximate cause of the injury.

Kelly vs. Jutte & Foley Co., 104 Fed. 955, 958;
American Bridge Co. vs. Seeds, 144 Fed. 605,
 609-10.

POINT IV.

*Was There Sufficient Evidence to Show That the Master
 Failed to Use Reasonable Care to Furnish
 a Reasonably Safe Place?*

We assumed in discussing Point 2, that the lower Court was right in finding or holding that there was evidence to show that one of the recognized uses of the pins was to prevent an accident of the kind in question.

In discussing the question under the present point, we take the position that there was no such evidence (see error No. 2); that the sole evidence before the Court was the happening of the accident and the evidence to show that it could have been prevented by the use of the pins; that in order to show that the master had not performed its duty it was necessary to show that the pins were intended to be used to prevent an accident of the kind in question. There was no evidence to show what the pins were intended to be used for and on what occasions they were intended to be used, and we assume that their purpose was when screwed in tight to give the ship additional strength to stand the roughness of the seas. The evidence of Bartholl is the evidence of an experienced stevedore, to the effect that there was plenty of room to work with only the centre section open; that the work had

been done in the same way for many years and, necessarily, therefore, on many ships, and that no such accident to his knowledge had ever happened before, and that in his opinion no such accident could happen, barring the negligence of the employees.

The lower Court says that the evidence of Bartholl does not negative the assumption that, on all the occasions which he testifies to, in which there was no such accident, the pins may have been in place. But it certainly must have happened in the last seventeen years that Bartholl had seen unloaded and helped to unload many ships which were not provided with pins.

Now, in most cases after an accident happens it is very easy to see how it could have been prevented, and to say, as the lower Court does, that the possibility of the accident was obvious (see error No. 4), but because it could have been prevented, does not necessarily render the master responsible. His duty is to use reasonable care to furnish a reasonably safe place. He has never been held to guarantee the safety of the place. He is only bound to use reasonable precautions to procure such safety, that is, such precautions as a reasonably prudent man would use. As, therefore, in the opinion of a man experienced in the business which the master was carrying on, all reasonable precautions had been taken, and as there was no evidence to show that the pins were intended to be used while the ship was being loaded, we submit that there was no evidence from which the Court could conclude that the master had not performed its duty.

The Noranmore, 113 Fed. 367.

It is, therefore, respectfully submitted that the decree in each of the above two cases should be reversed.

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STATE OF MARYLAND

DEPARTMENT OF THE TREASURY

OFFICE OF THE COMPTROLLER OF THE TREASURY

REPORT

ON

THE RECEIPTS AND DISBURSMENTS

FOR THE YEAR

ENDING

THE 31ST DAY OF DECEMBER, 1881

AND

STATE OF MARYLAND

OFFICE OF THE COMPTROLLER OF THE TREASURY

REPORT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1913.

No. 215.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA

vs.

FRANK IMBROVEK.

No. 216.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA

vs.

STATE OF MARYLAND TO THE USE OF MARY
SCZCESEK, WIDOW OF MARTIN SCZCESEK ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT.**

BRIEF FOR RESPONDENTS.

INTRODUCTORY STATEMENT.

These cases come before this Honorable Court upon a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit. The petition for the Writ of Certiorari was based upon the alleged diversity of decisions of two Circuit Courts of Appeal,

upon the question of admiralty jurisdiction. For this reason we respectfully submit that the assignment of error, raising the question of admiralty jurisdiction, will be the only one to be considered by this Honorable Court unless it can be shown that the concurring decisions of the two subordinate Courts, in passing upon the facts of this case, were clearly erroneous.

STATEMENT OF FACTS.

We respectfully submit that the facts as stated in the Petitioner's Brief are misleading in that they omit certain important facts and evidence. We refer more particularly to the heading, "Lack of Evidence," in the Petitioner's Brief. In view of what has been stated in the Introductory Statement, we do not deem it necessary to impose upon this Honorable Court by controverting in detail the Petitioner's argument upon the evidence as is set forth in the Statement of Facts. We desire however, to call this Honorable Court's attention to the following facts:

(A) The libels in these cases were filed against the Hamburg-American Steam Packet Company, a foreign corporation, with a Writ of Foreign Attachment, and also against the Atlantic Transport Company of West Virginia, a corporation which was conducting a stevedoring business. The testimony introduced on behalf of the libellants showed negligence on the part of the Hamburg-American Steam Packet Company, as well as on the part of the American Transport Company. It was however, upon the testimony adduced by the Atlantic Transport Company that the Steam Packet Company was exonerated, and the libel dismissed as to the latter.

(B) That the evidence shows there were certain bolts or pins which fastened the iron cross bars to the hatch combings, and that when these bolts were in place, it was impossible for the hatch covers to pull up (Imbrovek Record, page 58).

When therefore, these bolts were in place, an accident such as the one at bar could not occur. It takes a man about five minutes to put these bolts in (Imbrovek Record, page 61). It is not however, the business of a stevedore to put the bolts in. He notifies an officer of the ship and he in turn directs the ship's carpenter to put the bolts in position (Imbrovek Record, page 62). Ordinarily, a stevedore takes the bolts out, although it is possible that the ship's crew may take them out. The only way that the bolts could be placed in position is through the direction to an officer of the ship.

In the case at bar, when the ship arrived in Baltimore, and the stevedore took possession of the ship, the evidence shows that it was *not known* whether there were any bolts in the hatch covers at that time or not. Edward Bartholl, the head foreman, of the Stevedore Company, and in fact, as far as the evidence shows, their sole representative, testifies on this point as follows (Imbrovek Record, page 77):

“Question: As I understand it, you do not know whether these bolts were in place when the ship came in here or not. I think you said you did not make any inspection of them?

Answer: No, sir, I did not.

Question: Could the accident have happened if these bolts had been in?

Answer: No, sir.”

(C) That the accident occurred on a vessel while in *navigable waters*, to wit, alongside a pier in the harbor at Baltimore, Maryland.

We wish, in addition to this, to refer this Honorable Court to the full and impartial Statement of Facts in this case, in the opinion delivered by the District Court through Judge Rose, which is set out in full in the present Record. (Imbrovek Record, pages 85-86.)

ASSIGNMENTS OF ERROR.

Of the seventeen Assignments of Error (Imbroke Record, pages 99-101), the only two relied upon by the Petitioner are:

1—That a Court of Admiralty has no jurisdiction over a case brought by a stevedore against his master, a Stevedore Company, for an injury sustained while loading or unloading a vessel, when the said stevedore bears no contractual relation to the ship, its master, owner or agent.

2—(No. 13, as set forth in the Seventeen Assignments of Error), That there is no evidence to show that the accident and the consequent injury resulted from the negligence of the appellant, the Stevedore Company.

ARGUMENT.

POINT 1.

A—As to Question of Admiralty Jurisdiction.

We respectfully contend that Admiralty has jurisdiction in the cases at bar for the following reasons:

FIRST—*The question of whether or not a Court of Admiralty has jurisdiction over a case brought by a stevedore against a Stevedore Company alone, for an injury sustained aboard a ship, is not before this Honorable Court.*

SECOND—*Locality is the sole test of the jurisdiction of Admiralty over torts.*

THIRD—*The Constitutional extent of Admiralty jurisdiction is involved in the present case.*

FOURTH—*The tort in this case was essentially maritime in its nature.*

Of these in their order:

FIRST.

Libels in these cases, as we have above stated, were filed against the master and owners of the ship as well as the petitioner, the Stevedore Company. The libellants charged that both the masters and owners of the ship and the Stevedore Company were negligent in failing to place the pins or bolts in the hatch combings. If this allegation was true, Admiralty clearly would have jurisdiction. No argument can be based on the fact that the ship and its owners were joined with the Petitioner merely for the purpose of obtaining jurisdiction. The proctors for the libellants not being able to determine from the statements of the witnesses who was responsible for the dangerous condition that caused the accident, joined all. Upon the evidence produced on behalf of the *Atlantic Transport Company* the District Court concluded that the ship and its owners were not responsible, and accordingly, dismissed the libel as to them. Although the Court in this manner decided that the Stevedore Company was legally responsible for the serious injuries to the libellants, the Stevedore Company is now endeavoring to deprive the libellants of any compensation for the injury, after responsibility has been fastened upon it, upon the merits of the case, by two tribunals, though the technical claim that the District Court had no jurisdiction in rendering a decree against it, because the evidence showed that the ship or its owners were not *jointly* responsible with the Stevedore Company for the accident.

If the decision of the District Court had been otherwise, and the decree had been against the owners of the ship as well as the Stevedore Company, does the Petitioner contend that the decree as to the Stevedore Company would have been an invalid one? Or, again, if the decree had been against the ship's owner alone, would the libellants be entitled to begin suit anew in a State Court against the Stevedore Company?

We earnestly contend that the allegations of the libel, that is, the statement of the case, confers jurisdiction in the absence of evidence that such allegations are fraudulently made solely for the purpose of obtaining jurisdiction.

In support of this we wish to refer this Honorable Court to the decisions to the effect that:

(1) Where there is an allegation that the jurisdictional amount is involved, and it subsequently develops by the evidence that the jurisdictional amount was not involved, the Court has authority to enter judgment for a less amount, unless the allegations were fraudulently made for obtaining jurisdiction.

Smith vs. Greenhow, 109 U. S. 669;

Barry vs. Edmonds, 116 U. S. 650;

Schunk vs. Moline M. & S. Co., 147 U. S. 500;

Smithers vs. Smith, 204 U. S. 632.

This latter case is the last authority which has been found upon this point. In this case there was a suit for the recovery of land of the alleged value of \$5,000, and for \$2,000 damages for its detention. Upon hearing the evidence the Circuit Court stated that the defendants did not act jointly as the Plaintiff had alleged, and that the land taken and held by the Defendants was of much less value than \$2,000. The Court, then, acting upon the authority of the Act of March 3, 1875, and Amended Act of August 13, 1888, dismissed the action on the ground that the jurisdictional amount was not involved. The United States Supreme Court, reversing and remanding the case to a lower Court, stated in its opinion (through Justice Moody, 640):

“The rule that the plaintiff’s allegations of value govern in determining the jurisdiction, except where upon the face of its own pleading it is not legally possible for him to recover the jurisdictional amount, controls, even when the declaration shows that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount.”

(2) Where the requisite diversity of citizenship exists at the commencement of a suit, no subsequent change in the situation of the parties ousts the jurisdiction of the Court.

Morgan's heirs vs. Morgan, 15 U. S. 290 (2 Wheat.);

Clarks vs. Mathewson, 37 U. S. 164 (12 Pet.).

In the case of *Mollan vs. Torrance*, 22 U. S. 537, which was a suit on a promissory note, where a plea was entered that the parties were both citizens of the same State, and a demurrer to the plea on the ground that the plea did not aver that they were citizens of the same State at the time the action was brought, the Court, in sustaining the demurrer, speaking through Chief Justice Marshall, states:

"It is quite clear that the jurisdiction of the Court depends upon the state of things at the time the action was brought, and that after vesting, it cannot be ousted by subsequent events."

(3) Where federal and non-federal questions are involved, in the same suit, and jurisdiction has properly attached for the purpose of determining the federal question, the Federal Court has a right, and in fact, it is its duty to finally determine all matters in dispute.

Judge Brewer in *Omaha Horse R. R. Co. vs. Cable Tramway*, 32 Fed. Rep. 727, says on page 729, in delivering the opinion of the Court:

"It is the settled law of the Supreme Court, that when a case is presented involving a federal question, the jurisdiction of the Court attaches to the whole case, and is not limited to the mere decision of that single federal question."

Tennessee vs. Davis, 100 U. S. 257, 270;

R. R. Co. vs. Miss., 102 U. S. 135, 141;

Chappell vs. U. S., 160 U. S. 499;

Williamson vs. U. S., 207 U. S. 425.

The latest case that we have been able to find in this Court is the case of *Siler vs. L. & N. R. R. Co.*, 213 U. S. 175. This is a case in which the questions involved were the constitutionality of a certain State statute under the Federal Constitution ~~(a non-federal question)~~ *and the validity of an order of the State R.R. Commission*, the Court decided in this case that where jurisdiction had once been obtained because a federal question was involved, it was proper for the Court to decide the local question only and omit to decide the federal question.

If the law were otherwise than above stated, and the outcome of a suit could be looked to as fixing the jurisdiction of the Court, then it would follow that in every Admiralty case where the Court decreed in favor of the ship or its owner or master, it would by virtue of that decree, be deprived not only of jurisdiction to render any decree against the correspondent, or as in the case at bar the Stevedore Company, but also in favor of the ship or its owner or master.

The salutary effect of such a principle of law can be easily discerned, for otherwise, not only would great inconvenience result, but also injustice. In the case at bar the libellants suing *in forma pauperis*, come into the Court of Admiralty, which has jurisdiction of the ship's owners and masters, and agents, and join the Stevedore Company. After trial, they are informed that the ship's owners and master are not liable, that they have misjoined the Stevedore Company with the ship's owners and masters, because the Admiralty Court has no jurisdiction over the former, and they are therefore compelled to bring their suit *de novo*.

(4) Hackfeld case distinguished.

In the case of *Campbell vs. Hackfeld & Co.*, 125 Fed. 696, which was a libel for injuries by a stevedore against a Stevedore Company, where the injury was sustained aboard the ship, the Court held that it was not properly brought in Ad-

miralty, but clearly distinguished between the case where the ship and its owners have been joined, by using this language, on page 697:

"Not only does the libel fail to allege anything against the ship, its owner, officers or crew, but it affirmatively alleges 'that the persons who were engaged in the unloading of said bark *Aeolus* were all employees of said defendant, and not members of the crew, or employees of said bark *Aeolus*, and not fellow servants in any capacity with any of the employees of said bark *Aeolus*.'"

In other words the Court expressly held that in that case the allegations of the libel had not only failed to join the ship or its officers or crew in any manner, but had distinctly alleged that the former were in no way liable for the injury. Unless therefore this Honorable Court believes that the only object of joining the ship's owner and master in the libel at bar was to obtain jurisdiction in admiralty, we most respectfully urge, that having decided this question against the libellant, with regard to the ship's master, it is not only proper, but the duty of the Admiralty Court to determine the question as against the Atlantic Transport Company or stevedore company. In the case of the *Clan Graham* (decided since the Hackfeld case) reported in 153 Federal Reporter, 977, the Court held that under Admiralty Rule No. 46 it was permissible to join in tort for a personal injury a claim *in rem* against a vessel and one *in personam* against the stevedore company, although it can be shown that the latter are neither the master nor owner of the vessel, where the injury is alleged to have resulted from the joint negligence of both and the joinder will best serve the ends of justice. The Court in its opinion on page 979 says:

"The libel as it affects either, arises from the same state of facts, and the relief obtainable is identical, except that the enforcement of the decree in one case will be against the ship, or the thing, while in the other it will be against the person, and execution will be satis-

fied generally out of the property of that defendant. I see, therefore, no reason why in permitting the joinder, justice would not be as well subserved in the one case as in the other. Such joinder is not prohibited by the rules; and parties guilty of a joint tort being liable jointly or severally, the practice would be no innovation of the general rule obtaining at law. By analogy, I am constrained to the opinion that both expediency and justice warrant its application in admiralty also."

The question of jurisdiction was not raised in this case, the right of recovery as against the stevedore being undisputed. Apparently the only point which the Court thought worthy of consideration in determining whether there had been a *misjoinder* was the question of joining an action *in rem* with an action *in personam*.

SECOND—LOCALITY IS THE SOLE TEST OF THE JURISDICTION OF ADMIRALTY OVER TORTS.

It is confidently asserted that in questions of tort, from the earliest decisions the sole test of Admiralty jurisdiction has been the *locality of the person or thing injured at the time of impact with the intentional or negligent force*.

No Supreme Court or Lower Federal Court case has ever limited this so-called "Locality Test," except the one case in the Circuit Court of Appeals for the Ninth Circuit (Hackfeld Case, 125 Fed. 696). In fact, the jurisdiction of Admiralty over torts has been gradually enlarged and extended by the recent decisions.

In questions of contracts, as distinguished from torts, Admiralty jurisdiction depends mainly upon the subject-matter—that is, the nature of the service and engagement—and is limited to such subjects as are purely maritime.

Ex-parte, Easton, 95 U. S. 72;

Insurance Co. vs. Dunham, 11 Wal. (78 U. S.),
1, 26.

1. Distinction Between Admiralty Jurisdiction of the United States and that of England.

The greater portion of the Petitioner's Brief is devoted to an interesting history of the English Statutes and the decisions of the English Courts in order to convince this Honorable Court that it is now time to abandon our whole course of decisions and return to the hopeless confusion resulting from the varying decisions of the English Common Law Judges, which, as was said by Justice Grier in the case of *Moorewood vs. Enequist*, 23 Howard, 493,

"are founded on no uniform principle and exhibit illiberal jealousy and narrow prejudice."

By reason of the jealousy of the English Common Law Courts, against the Admiralty, the latter's jurisdiction is narrower and more restricted in England than in any other Country. In the United States the Admiralty jurisdiction of the courts is not confined or restricted by restraining statutes or the prejudiced interpretations of these statutes by the judiciary.

The learned and exhaustive opinion of Justice Bradley, in the case of *Insurance Co. vs. Dunham*, 11 Wall. 1, deciding that Admiralty has jurisdiction to entertain a libel *in personam* on a policy of marine insurance to recover a loss, remains today as one of the land marks on the question of Admiralty jurisdiction in contracts. The learned Judge reviewed in detail the reasons why the English statutes and decisions have little or no application to the Admiralty jurisdiction of the courts of the United States. On page 2 he uses this language:

"But this narrow view has not prevailed here. This Court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be

interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England."

Mr. Justice Bradley, approximately four years later, in the case of "*The Lottawana*," 21 Wall. 558, 574, reiterates the futility of resorting to the English decisions in order to enlighten our courts in determining the question of Admiralty jurisdiction, but states rather that the decisions of this Court, giving the construction to the laws and the constitution, are especially to be considered.

Vide also—

N. J. Steam Navigation Co. vs. Merchants Bank,
47 U. S. 344, 385;

"*The Blackheath*," 195 U. S. 361.

2. Locality The Sole Test.

As has been stated, the sole test of jurisdiction of tort cases is locality for more than fifty years this Court having so decided in a multitude of cases, without dissent or question. The first important case in which the question of admiralty jurisdiction in torts was considered is the case of "*The Plymouth*" in 3 Wall. 36, which was a case involving damage by fire to packing houses upon the wharf, by flames from a tug. The Court decided that Admiralty did not have jurisdiction, because the damage occurred on land, but in reviewing the question of Admiralty jurisdiction in questions of tort, the Court, speaking through Justice Nelson, uses this language:

"Every species of tort, however occurring, whether on board a vessel, or not, if upon the high seas or navigable waters is of admiralty cognizance." (Italics supplied.)

This case has been repeatedly cited and applied by this Court.

Judge Story, in *Thomas vs. Lane*, 2 Sumner, page 1—(page 9)—with regard to jurisdiction of Admiralty in torts:

“I have always understood that the jurisdiction of admiralty is exclusively dependent upon the locality of the act.”

Vide also—

Delovio vs. Boit, ² ~~1~~ *Gallison*, 398.

The trend of the decisions of this Court, we respectfully contend, has been to enlarge, rather than to narrow, the Admiralty jurisdiction in questions of tort.

In *Leathers vs. Blessing*, 105 U. S. 626, a case for damages, brought by a stranger against the master of a Steamboat Company for injuries resulting from the latter's negligence in failing to properly protect a person who desired to go aboard the vessel while at the wharf, the Court, upholding the right of Admiralty to assume jurisdiction in such cases, stated (on page 630):

“Not only does the jurisdiction of Courts of Admiralty in matters of tort depend entirely upon locality, but, since the case of *Waring vs. Clark*, 5 Howard, 441-464, the exception of *infra corpus comitatus*, is not allowed to prevail.”

Prior to the case of the *Genessee Chief*, 12 Howard, 443, locality was restricted to torts within the ebb and flow of the tide. This case, however, extended the locality to cover all navigable waters.

In the *Blackheath Case*, 195 U. S. 361, the jurisdiction is extended to cover an injury to a beacon light on the ground that it is a Government aid to navigation.

However, in the cases of *Cleveland, Etc., R. R. Co. vs. Cleveland Steamship Co.*, 208 U. S. 316, and *The Troy*, 208

U. S. 321, which shortly follows the *Blackheath Case*, and in which injuries were caused by vessels to drawbridges, Admiralty jurisdiction was denied, but on the ground that the bridges were aids to commerce on land. The old "Locality Test" of the *Plymouth Case* being still maintained and the cases distinguished from the *Blackheath Case*.

In the case of *Simmons vs. The Steamship "Jefferson,"* 215 U. S. 130, jurisdiction is extended to cover a ship in dry-dock, where the water had been entirely withdrawn.

The most recent Supreme Court case is the case of *Martin vs. West*, 222 U. S. 191. This case involved a collision between a vessel and a supporting pier of a bridge over a navigable highway of the United States, caused by the negligent management of the vessel and resulting in the collapse of the span of the bridge and its fall into the stream. This case upheld the "Locality Test," but denied Admiralty jurisdiction, because of the fact that the bridge was attached to realty and an aid to commerce on land.

The "Locality Test," we respectfully submit, is supported by numerous considerations, both of convenience and reason, as well as by the overwhelming weight of judicial authority. The *certainty* secured by this test is in itself a sufficient argument therefor. If the consideration as to the character of the tort committed upon navigable waters is allowed to enter, there must necessarily be confusion and a vast increase of litigation. In every case where the libellant has proved successful, the respondent will endeavor to show by technical and artificial methods of reasoning, that the tort complained of was not in reality *maritime* in its nature. The petitioners ask whether cases of assault, battery, slander, etc., committed upon navigable waters would be the proper subject of Admiralty jurisdiction. They contend that there has never been a case in which the jurisdiction over such torts has been sustained.

The petitioner's argument is based solely upon such deductions as can be made from the entire *absence* of adjudications, either one way or the other. They have not been able to produce a single adjudicated case in which jurisdiction over such torts has been denied.

We, therefore, respectfully contend that their deduction is not a logical one; that the absence of adjudications would rather indicate, that if controversies of this kind have been brought into the courts, the parties have preferred to have them heard by a jury in the law courts, in view of the fact that they involve no principles peculiar to maritime law, or as Judge Rose in the District Court says in his opinion (Imbrevé Record, page 93):

"It must be borne in mind, however, that when the boss stevedore was pecuniarily worth suing, he could be conveniently sued in the State Court. Most lawyers who make a specialty of personal injury cases prefer to try them before juries. There may be a number of cases in the district courts, as there has been at least one in Maryland, in which the jurisdiction seemed to the judge so clear as not to justify an opinion."

THIRD—THE CONSTITUTIONAL EXTENT OF ADMIRALTY JURISDICTION IS INVOLVED.

As we have heretofore stated, the trend of the decisions of this Court has been to broaden, rather than to limit, the Admiralty jurisdiction of the Federal Courts. The "subject-matter test" in the case of Admiralty jurisdiction over contracts, rather than the "locality test," was an undoubted extension. If the decisions of this Court were otherwise, and Admiralty jurisdiction was limited ~~a restriction either~~ over torts as is the contention on behalf of the petitioner in the present case, we respectfully submit that it would be impossible to extend jurisdiction to torts of *every kind and*

species when occurring on navigable waters, except through an amendment to the Constitution of the United States.

The Constitution declares that the federal power of the United States shall extend "to all cases of Admiralty and Maritime jurisdiction" (Article 3, Section 2, Clause 1), without in any way defining the limits of that jurisdiction.

The Federal Congress by the judiciary Act of 1789 established the District Courts and conferred upon them "exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction." In other words, the grant of admiralty and maritime jurisdiction by Congress to the Federal Courts in civil cases is co-extensive with the gift to Congress by the Constitution itself

(1) *Comparison with Decisions upon Criminal Jurisdiction of Federal Courts in Admiralty and Maritime Cases.*

The Constitution does not in express terms confer upon Congress the power to legislate with regard to matters maritime, but by *Article 1, Section 8, Clause 10*, there is conferred upon Congress the power to define and punish piracies and felonies committed on the high seas. The right of Congress to define and punish felonies upon other waters than the high seas is derived from the declaration of the Constitution, *Article 3, Section 2, Clause 1*, which is the grant to the judiciary of jurisdiction over all cases of admiralty and maritime jurisdiction, a jurisdiction which has been held to be entirely exclusive and has been construed to give the Federal Legislature a power over the law which the Federal Courts are thus called upon to interpret and apply. For this reason Congress under the above mentioned admiralty and maritime jurisdiction clause has vested in the Federal Courts jurisdiction over numerous crimes, such as murder, robbery, assault with intent to kill and misdemeanors, irrespec-

tive of their maritime nature, which arise upon navigable waters. By the first Crimes Act passed by Congress in year 1790 (Act of 1790, Chapter 9, Paragraphs 7 and 8) punishment was provided for *manslaughter* when committed on the high seas and for *murder* when committed either on the high seas or in any river, haven, creek, basin or bay within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State. The Supreme Court decided that "the particular State" intended was a State of the United States, and not a foreign country.

U. S. vs. Brailsford, 5 Wheaton, 184.

The Court further held that a navigable tidal river in China was not a part of the "high seas," consequently a person could not be lawfully convicted of *manslaughter* committed upon an American ship on such a river.

U. S. vs. Wiltberger, 5 Wheaton, 76.

Chief Justice Marshall in this case did not for one moment *question the power of Congress to legislate* upon this subject. As a result of this decision the Crimes Act was redrafted in 1825 (Act of 1825, Ch. 65, Par. 4), and extended the application of the Act not only to the high seas, but to any arm of the sea or to any river, haven, creek, basin or bay if within the admiralty jurisdiction and without the jurisdiction of any State. Admiralty jurisdiction was thus extended over all the arms of the sea.

U. S. vs. Grush, 5 Mason, 290.

None of the authorities from that day to this have *doubted the power of Congress to legislate* as to all offenses occurring upon navigable waters.

U. S. vs. Wilson, 28 Fed. Cases, 718;

Miller's Case, 17 Fed. Cases, 300.

It is true that Congress has wisely refrained from interfering with the State Court's jurisdiction over such offenses as were committed upon the navigable waters of the State and upon the sea within a marine league of their shores.

U. S. vs. Bevans, 3 Wheaton, 336;

Manchester vs. Massa, 139 U. S. 240.

In the case of the *United States vs. Rodgers*, 150 U. S. 255, the accused was charged with making an assault with a deadly weapon, while aboard a ship upon that part of the Detroit River which is within the jurisdiction of the Dominion of Canada, and consequently without that of any particular State. There was no statute making an assault with a deadly weapon punishable unless the Detroit River was held to be a river "connected with the high seas." The majority of the Court held that the Great Lakes with which the Detroit River connects were "high seas." Two justices (Gray and Brown) very strongly dissented, but they did not question the right of Congress to punish offenses which were committed upon navigable waters; they simply pointed out that Congress had not seen fit to exercise its power to do so. As a result of this decision, the Act of September 4, 1890, Ch. 874, was passed which was entitled "An Act Extending the Criminal Jurisdiction of the Circuit and District Courts to the Great Lakes and their connecting waters." We feel, therefore, that it is safe to assume that Congress has the power to provide for the punishment of *all offenses committed upon navigable waters*. It has never been suggested that this power is limited to offenses or persons which or who are connected in any way with the ship upon which the deed is committed. Jurisdiction to redress such offenses is *exclusively territorial in character*. Since Congress may therefore provide for the punishment of *all* crimes committed within admiralty jurisdiction, and it has given the district Courts cognizance of *all* civil cases of admiralty and maritime juris-

diction we confidently claim that it follows as a necessary deduction that those Courts on the civil side have now jurisdiction over all torts committed upon the waters over which Congress can exercise criminal jurisdiction.

If it were otherwise, it would follow that the Admiralty Courts could never be clothed by the Federal Legislature with jurisdiction over *all* civil wrongs, regardless of their nature, occurring on navigable waters. *It will be noted that Congress has in fact given the District Court jurisdiction over ALL civil cases "of admiralty and maritime jurisdiction."*

Since this language is that of the Constitution itself, this grant is as broad as Congress can *constitutionally* make it, if it be held now that the grant does not include *all* civil wrongs independent of contract, consummated on navigable waters, it follows that the jurisdiction over such wrongs could only be effective by Constitutional Amendment. We would therefore have this anomalous situation; that Congress could attach *criminal* liability to certain acts, regardless of their nature, committed on navigable waters, but would be without the power to attach *civil* liability to the same acts.

FOURTH—THE TORT IN THIS CASE WAS ESSENTIALLY MARITIME IN ITS NATURE.

Granting solely for the sake of argument that this Honorable Court should be of the opinion that "locality" is not the sole test of Admiralty jurisdiction in cases of tort, but that this test should be qualified by showing the relation of the parties to the ship or vessel, we respectfully urge that in the case at bar the libellants were injured not only in a maritime locality (upon navigable waters), but while in performance of maritime services. The claim of a stevedore for services rendered in loading and unloading a vessel is clearly for a maritime service essential to the purpose of

the voyage, and according to the great weight of authority, especially the more recent cases, is within the jurisdiction of Courts of Admiralty. To receive and deliver the cargo are as much a part of the undertaking of the ship as its transportation from one port to another. To say that the service rendered is not a maritime service because the final delivery is on shore, is begging the question, as the *nature of the service* and not the *place* where rendered should determine its character, in this respect.

Although this Court, as far as we have been able to ascertain, has never passed directly upon this question, however, in the case of *Insurance Company vs. Dunham*, cited above, the established doctrine was laid down that whether a contract for service was maritime or not depended not on the place where the contract was made, but on the subject-matter of the contract, if that was maritime the contract was maritime. This case has been followed in a number of cases sustaining the maritime nature of contracts for stevedore services.

Even after the services of the stevedore were decided to be maritime in their nature, a maritime lien to enforce their payment was denied when the services were rendered in the vessel's home port.

"The Gilbert Knapp," 37 Fed. 209.

The lien being allowed, however, when they were rendered to a foreign vessel.

George T. Kemp, 10 Fed. Case, 5341.

The services are now, however, considered so maritime in their nature that the lien is granted without reference to the port in which the services are rendered.

"The Segurranca," 58 Fed. 908;

"The Mattie May," 47 Fed. 69;

"The Senator," 21 Fed. 191;

"The Coningsby," 202 Fed. 814.

The stevedore is the natural descendant of the crew. Formerly the crew itself loaded and unloaded the vessel, but as commerce progressed there was a demand for quicker and more efficient service and for an opportunity to be given to the crew to rest and make preparation for future trips, thus the stevedore came into existence.

It is therefore respectfully submitted that even if the character and nature of the tort, in addition to the locality, is to be considered in determining whether or not admiralty has jurisdiction, the tort complained of in the case at bar is distinctly of a *maritime nature*.

POINT II.

A—As to Question of Evidence.

In the Petitioner's Brief, under Points II, III and IV, the second assignment of error is taken up under three sub-headings. The second assignment of error was as follows:

That there is no evidence to show that the accident and the consequent injury resulted from the negligence of the appellant, the Stevedore Company.

The above-mentioned sub-headings therefore raise the question on the merits of the case. This is a question dependent upon the general law of master and servant in its application to the facts of the case and not upon the maritime law nor upon the jurisdiction of the Courts of the United States, nor the interpretation of any federal statute or treaty.

FIRST—*Questions of evidence intended to be submitted to the final jurisdiction of the Circuit Court of Appeals.*

As has been heretofore stated in the "Introductory Statement," these cases are in this Honorable Court upon *cer-*

tiorari, the application for which was based upon the alleged conflicting decisions of two Circuit Courts of Appeals on the question of admiralty jurisdiction. But for this circumstance, we respectfully contend, the decision of the Circuit Court of Appeals would be final. It is argued, therefore, that the case at bar, on its merits, is of a character, which, under the Judiciary Act of 1891, was intended to be submitted to the *final jurisdiction* of the Circuit Court of Appeals, and that if this Court decides the question of jurisdiction in favor of the respondents, it will, so far as the merits of the case are concerned, go no further than to inquire as to whether *plain error* has been committed by the two subordinate Courts.

In support of this we wish to refer this Honorable Court to the case of *Chicago Junction Railway Company vs. King*, 222 U. S. 222.

In this case the plaintiff had recovered for personal injuries in a cause of action based upon the Federal Safety Appliance Act and the defendant appealed from the judgment of affirmance in the Circuit Court of Appeals for the Seventh Circuit. The principle contention by the appellant was that the plaintiff had been guilty of contributory negligence in going between the cars of his train. This Court, while conceding its jurisdiction to review this case on appeal, "because the cause of action as stated in the pleadings, rested upon the Safety Appliance Law" added "the questions now presented in a broad sense are of a character which ordinarily it was the purpose of the Judiciary Act of 1891 * * * to submit to the final jurisdiction of the Circuit Court of Appeals." The Court then described the extent to which it would review the facts in these words (speaking through Chief Justice White, page 223):

"Under the conditions just stated, we do not think we are called upon to scrutinize the whole record for the purpose of discovering whether it may not be possible, by a minute analysis of the evidence, to draw there-

from inferences which may possibly conflict with the conclusions of the courts below as to the tendencies of the proof. We are of this opinion because in this and cases like it, that is, in cases where the conditions are in all respects identical with those here presented, we think our whole duty will be performed by giving to the record such examination and consideration as may be necessary to enable us to determine whether plain error was committed by the Court below in any of the particulars complained of."

The same rule was applied in the case of *Texas and Pacific Railway Company vs. Howell*, 224 U. S. 577.

These cases were cited and followed in the recent case of *Chicago, Rock Island and Pacific Railway Company vs. Brown*, 229 U. S. 317 (June 10, 1913).

That this Court, in Admiralty cases, will not reverse the concurring decisions of two subordinate Courts upon a question of facts, unless shown to be clearly erroneous, is the decision in the case of "*The Iroquois*," 194 U. S. 240, where this language is used (page 247):

"We regard the case as peculiarly one for the application of the general rule so often announced by this Court, both in Equity and Admiralty cases, that this Court will not reverse the concurring decisions of two subordinate Courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions."

Vide also—

"*The Conqueror*," 166 U. S. 110;

"*The Carib Prince*," 170 U. S. 655.

These principles of law are closely applicable to the present cases, the questions involved being of such a nature as would have been submitted to the final jurisdiction of the Circuit Court of Appeals for the Fourth Circuit, but for the fact that a question of admiralty jurisdiction was presented.

Unless, therefore, in the cases at bar, the two subordinate Courts can be found to be clearly erroneous in their findings of facts, we respectfully submit that this Honorable Court will not interfere with such findings, especially in view of the fact that the District Court had the witnesses *personally* before him and none of the testimony was taken by deposition.

Furthermore, a brief review of the evidence would suffice to show that the lower Courts were thoroughly supported in their findings upon the facts. We will, therefore, take up the sub-headings of the Petitioner's Brief in their order:

SECOND—*Evidence discussed.*

(1) The Master Failed in His
Duty to Provide a Safe Place.

It will not be necessary to discuss the question of whether or not the duty of the master of exercising reasonable care to furnish a reasonably safe place in which the servant is to work is a *non-delegable* duty. The petitioners admit this in their brief. Their contention is rather that the evidence in this case fails to show that the master did not perform his duty in providing such a place, that the master did supply his employees with all necessary appliances in order to make the place of work a reasonably safe one and that any failure to make this place safe was due to the improper use or non-use of these appliances by the co-employees, for which the master was not responsible. In other words, that so far as *construction* was concerned, the master had fulfilled his entire duty, and that any subsequent defective or dangerous condition of the premises was the result of the operation or provision in the details of the work, for which the master is never responsible.

As we have stated under the heading "Statement of Facts," there is not a particle of evidence to show that the bolts or

pins which fastened the cross-beams to the hatch combings were in place when the ship arrived in Baltimore and the stevedore took possession of the ship. In fact, the head foreman for the Stevedoring Company, Bartholl testified (Imbrokek, Record, page 77), that he did not pay any attention to whether the bolts were in or not.

Under these circumstances, the libellants, who as this Honorable Court well knows, are the most ignorant class of men, in most cases unable to speak a word of English, were directed to go below and perform their duties in a place, which could have been made safe in five minutes, when on the other hand the stevedore admits that he did not pay any attention, in fact did not know whether the place was safe or not. In order to escape liability, the appellants in their brief contend that inasmuch as there was on board the ship all the necessary appliances to make the place safe, any dangerous condition of the premises was the result of the details of the work performed by the co-employees of the libellants. They state (Brief, page 29) referring to the ship: "She was therefore, upon her arrival a safe place in which to work. If therefore, she became unsafe, it must have occurred from something that the servants did or omitted to do." As a matter of fact, there is not one particle of evidence to show that *the place wherein the libellants were to work was ever a reasonably safe place*. If the testimony had shown that at the time the ship came into the port of Baltimore the bolts were in place, the question might be raised that the place was safe at that time. However, in the case at bar, the entire attention of the stevedore company was directed to protecting the cargo, and although it was unnecessary to leave the hatch covers on below the top deck, in order to save expense, only the middle section was removed. It is confidently claimed that the master failed utterly to fulfil his duty in furnishing a safe place to his employees.

It is a well-recognized principle of law as laid down by the Federal decisions, that where there are two methods of doing work, and one of them is dangerous and the other safe, the employees in choosing the former method represent their master in the non-delegable and non-assignable duty of maintaining and providing a safe place for their fellow-employees.

In *Gaynon vs. Klander-Weldon Dyeing Machine Co.*, 174 Fed. Rep. 477, a case where a piston head was sent to a blacksmith to be heated, in order that a larger piston rod might be inserted in it, and the person sending the piston head neglected to inform the blacksmith that it would be necessary to make a vent in the piston head in order to prevent an explosion, an accident occurring, the Court on page 485 says:

"It is undoubtedly true that a master who employs competent superintendents and foremen may leave the execution of the details of the work to them, and it is not required to oversee the details, and that where there are different methods of doing certain work, it may leave it to them to select the method, but if some methods or processes are dangerous, and others not dangerous, and this is known to the master and the selection of method is left to the foreman in charge, and he is at liberty, as was the case here, to adopt either method, and he adopts the dangerous one and directs the work to be done in that way, he represents the master in so doing, and the selection of mode or methods is the act of the master as much as if he were personally present and made the selection, and as it would be negligence for the master to set the ignorant workmen to the execution of the work in that manner without warning or instructions, so it would be his negligence should the vice-principal or foreman set the ignorant employe to do work according to the dangerous method without warning or instruction as to the danger."

In 26 Cyc. 115, we find this language:

"* * * yet as a general rule a master will not be held responsible for injuries to a servant in the course of his employment where the usual and customary methods of work are employed, *provided such methods do not disregard the safety of the servant.*"

See also—

O'Brien vs. Buffalo Furnace Co., 183 N. Y. 317.

What constitutes a reasonably safe place under certain circumstances would not do so under others; the different surroundings and circumstances must be taken into consideration in order to determine whether or not the master has exercised reasonable and ordinary care in furnishing a safe place for his employees to work in. This question has therefore been left to the determination of the jury under proper instructions from the Court.

In *Grand Trunk R. R. vs. Ives*, 144 U. S. 408, on page 417, the Court says:

"There is no fixed standard in the law by which a Court is enabled to arbitrarily say in every case what conduct shall be considered reasonable and prudent, and what shall constitute ordinary care under any and all circumstances. * * * What may be deemed ordinary care in one case, may under different surroundings and circumstances be gross negligence. The policy of the law has relegated the determination of such questions to the jury under proper instructions of the Court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs."

When a master employs a servant, he impliedly engages with him that the place in which he is to work and the machinery and appliances with which he is to work, or by which he is surrounded shall be reasonably safe and the employee

has a right to assume that this duty has been fulfilled by the master, and it is the master's positive duty to the employee to do so.

B. & O. vs. Baugh, 149 U. S. 368.

In the case at bar, the District Court after hearing the testimony concluded that the place in which the libellants were working was not a safe place, and that the failure of the master to provide for an inspection of the premises, or to promulgate any rules or orders with regard to the proper protection of its employees constituted negligence. In fact, it is respectfully urged that on a perusal of the Record in this case, it will be noted that the District Court was greatly impressed with the apparent disregard of human life exhibited by the head foreman of the stevedore company. This disregard almost amounted to criminal negligence. He did not care whether the bolts were in or not; his sole duty was to hasten the work, protect the cargo and save expense. In the language of the District Court (Imbroke Record, pages 95 and 96):

"The stevedore was bound to use due diligence to see that the libellants had a safe place in which to work, if it had issued orders to the foreman or its gang boss that they were not to allow the men to work under partly covered hatches where the pins were out, then if these instructions were disobeyed, the negligence would be the negligence of the gang boss.

* * * * *

"There is no evidence that any such orders, whether general or special, were ever issued."

We submit, therefore, that the master failed entirely to provide a safe place for his employees to work in.

(a) *Lenk, the Gang Boss, a Vice-Principal.*

Although in view of the circumstances of the case at bar, it does not seem necessary to determine whether or not the gang boss was a fellow-servant of the libellants, we respectfully contend that Lenk, the gang boss, was a vice-principal of the respondent corporation, and that his negligence was its negligence.

With regard to the doctrine of vice-principal, the Federal Courts have decided that neither the grade nor rank of employment, nor the control over other employees, or the power to hire or discharge determine the question of whether or not an employee is a vice-principal. *The real test is, whether the character or nature of the act done is such as in itself to impute negligence on the part of the master.* Therefore, where the act is such that it affects the vital interests of the employees, the employee who has the power to do this act, is, as to such act, a vice-principal of the master. In other words, if the negligence complained of consists of acts done or omitted by the employee having authority, which relate only to his duties as co-laborer with those under his control, and which might just as readily occur with one of them, who had no authority, the common master is not liable. If, however, the negligent acts are the direct result of the exercise of the authority or discretion conferred upon him by the master over his co-employees, the master is liable.

In the case of *Peters vs. George*, 154 Fed. Rep. 634, the Court says on page 639:

"While at one time the so-called theory of vice-principal was much resorted to, in working out the liability of a master for injuries to an employee incurred in his service, it has, subsequently to the decision of the Ross Case, 112 U. S. 377; 5 Sup. Ct. 184; 28 L. Ed. 787, been largely discarded, at least in the Federal Courts, and the distinction between negligence, that is, to be imputed to the master, and that which is to be considered

as merely and solely the negligence of a fellow-servant, has been placed upon a more satisfactory and rational basis. In the opinion of Mr. Justice Brewer, delivering the judgment of the Supreme Court in *B. & O. R. Co. vs. Baugh*, 149 U. S. 368; 13 Sup. Ct. 914; 37 L. Ed. 722, the whole subject has been instructively discussed, and it has been clearly and logically settled upon what grounds a master may be held liable for injuries incurred by a servant in the course of his employment. The question is always, whether the negligence charged is the neglect of a primary and absolute duty of the master to the servant. If such be its character, no delegation of the performance of that duty to another, no matter how inferior his rank may be in the master's service, can as we have already said, relieve the liability of the master for its neglect. The master does not insure the safety of the servant, but he does undertake that the place in which he works, and the appliance with which he works, shall be reasonably safeguarded. A dereliction of the humblest employee in the master's service, to whom any part of such duty has been delegated, is the dereliction of the master."

In the case at bar, the gang boss was, according to the testimony, the man to request the officer of the ship to direct the ship's crew to place the bolts in such hatch covers as were left in position. This act could not be performed by any of the gang boss's co-laborers. It was an act which involved the protection of the co-laborers, and as to this act the gang boss or foreman, by whatever name he might be called, was a vice-principal.

In addition Lenk did have complete control of the work of loading and unloading. He had the power to employ and discharge the men under him.

(b) Bartholl, the Head Foreman, a Vice-Principal.

Barttholl, the Stevedore Company's sole witness, although not present at the time of the accident, appears to have been

the *sole representative* of the company, and to have had entire charge of the work of loading and unloading the ships.

In the language of the District Court (Record, p. 96):

"The testimony in all events does not show what other human being acted for the corporate respondent. He undoubtedly occupied the position of vice-principal."

The duty of giving warning of the dangerous nature of the employment, or instructions as to such dangers and the proper method or manner of doing the work, in order to avoid them, and the duty of inspection, are all duties which rest upon the master, and *cannot be assigned or delegated* by him so as to exonerate the master in case they are not performed. Bartholl, the sole representative of the respondent company, was the only person to give such instructions and to provide for the making of inspections, and he failed to do so.

The appellants contend in their brief that no testimony has been adduced to show what Bartholl's duties were, except such as can be gathered from his statement that he had a gang at work in the particular hatch.

Is it incumbent upon the libellants to show what the exact duties of the head foreman were? He testified that he was in charge of the disposition of the various gangs. He did not have to report to any one, was, apparently, in complete control of the work. Irrespective of whether this Honorable Court should believe that Lenk, the gang boss, was a *vice-principal* or a *fellow servant* it was Bartholl's duty to instruct him to make a proper inspection of the hatch covers, and if he failed to instruct him, his negligence was the negligence of his master. He testified definitely that he not only *did not instruct* any one, but that he *did not care* whether the pins were in the hatch covers or not. Where the master places the entire charge of his business in the hands of an agent, the neglect of the agent in supplying and maintain-

ing suitable instrumentalities for the work required is a breach of duty for which the master is liable.

Mullan vs. Phil. & South Mail S. S. Co., 78 Pa. St. 25;

(2) Evidence as to the Proximate Cause of the Accident.

The evidence adduced on behalf of the libellants is uncontradicted that the accident could not have happened if the bolts or pins had been in place. The expert, Frank Priehler, stated that the hatch sections with bolts would be much safer. William Mayerowicz, another witness, testified that the accident could not have happened if the bolts had been properly fixed, and also stated that he examined the hatch immediately after the accident, and found that it did not have any bolts at all.

The only testimony that the accident could have happened in any other way, was that adduced by the respondent corporation when Barttholl, its witness, who was not present at the time of the accident, testified that the accident in his opinion might have happened in one of two ways, either

- (1) By the failure to properly steady the net as it was raised from the hold, or
- (2) Failure to properly shackle the net to the hook.

These were only theories, or suppositions. There is not a particle of evidence to show that the net was not properly steadied in its ascent, nor that the shackles were not properly hooked. Two eye witnesses swear that the net was hooked on.

The District Court in its opinion says (*Imbrokek Record*, page 95):

"As I saw and heard the evidence, I was convinced that so soon as the accident happened every one except the laborers themselves thought of the pins."

(3) Evidence as to Safety
of Place to Work.

The fact that Barttholl testified that no such accident had ever happened in his experience has little value. There is no testimony to show how often work of this character had been carried on under similar conditions without the pins in position, and as the District Court in its opinion (page 95) says:

"Even if that had been frequently done, it would have tended to show that the stevedore had been fortunate rather than prudent."

We confidently claim, therefore, that the findings of the District Court are entirely supported by the evidence in the case.

CONCLUSION.

It is therefore respectfully submitted that the decrees of the Circuit Court of Appeals in these cases should be affirmed.

Respectfully submitted,

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ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA *v.* IMBROVEK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 215. Argued January 29, 30, 1914.—Decided May 25, 1914.

As a general principle, the test of admiralty jurisdiction in tort in this country is locality.

Admiralty has jurisdiction of a suit *in personam* by an employé of a stevedore against the employer to recover for injuries sustained through the negligence of the latter while engaged in loading a vessel lying at the dock in navigable waters.

The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history, *The Blackheath*, 195 U. S. 361, and *quære* whether the admiralty jurisdiction extends to a case where the tort is not of a maritime nature although committed on navigable waters.

A tort committed on a vessel in connection with a service thereto may be maritime even if there is no fault on the part of, or injury to, the ship itself.

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Argument for Petitioner.

Stevedores are now as clearly identified with maritime affairs as are the mariners themselves.

Whether the employer failed to provide a safe place to work is a question properly determinable by the Circuit Court of Appeals in last resort, and this court will not disturb such a finding if concurred in by both courts below and justified by the record.

193 Fed. Rep. 1019, affirmed.

THE facts, which involve the admiralty jurisdiction of the United States courts over suits for personal injuries sustained on a vessel in port while being loaded by a stevedore, and questions of negligence of the stevedore, are stated in the opinion.

Mr. Edward Duffy, with whom *Mr. Nicholas P. Bond* and *Mr. Ralph Robinson* were on the brief, for petitioner:

Admiralty has not jurisdiction; locality is not the sole test of jurisdiction; the tort is not of a maritime nature; the master did not fail to furnish a safe place to labor; failure to use pins was not the proximate cause; there was no evidence to show that the master failed to use reasonable care.

In support of these contentions, see *Atlee v. Packet Co.*, 21 Wall. 389; *Alaska Mining Co. v. Whelan*, 168 U. S. 86; *Amer. Bridge Co. v. Seeds*, 144 Fed. Rep. 605; Black Book of Admiralty (Twiss); Bacon's Abridg. Actions, Local and Transitory; *British African Co. v. The Compania*, App. Cas. (1893) 602; 2 Brown's Admiralty (1 Amer. ed.), 94-95; Benedict's Admiralty (4th ed.), 39, 46, 47; *The Blackheath*, 195 U. S. 361; 2 Bailey's Personal Injuries, §§ 2885 and 2993; *Brown v. People's Gas Light Co.*, 81 Vermont, 477; *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368; *Campbell v. Hackfeld*, 125 Fed. Rep. 696; *Cleveland &c. R. R. v. Cleveland S. S. Co.*, 208 U. S. 316; 9 Columbia Law Rev. 1; *Cleveland v. R. R. Co.*, 73 Fed. Rep. 970; *DeLovio v. Boit*, 2 Gall. 399; Gilbert's Practice (3d ed.), 84, 85; 16 Harv. Law Rev. 210; 18 *Id.* 299; 25 *Id.* 381; *Hussey v. Cogger*, 112 N. Y. 614; *Hogan v. Henderson*, 125

N. Y. 774; *Kelly v. Norcross*, 121 Massachusetts, 508; *Kelly v. New Haven Stmb. Co.*, 74 Connecticut, 343; *Kelly v. Jutte Co.*, 104 Fed. Rep. 955; *Leathers v. Blessing*, 106 U. S. 626; *The Morris Max*, 137 U. S. 1; *Mostyn v. Fabrigas*, 1 Smith L. Cases (11th ed.), 591; *Malloy de Jure*, Bk. II, Ch. III, § XVI; *Martin v. West*, 222 U. S. 191; *Martin v. Railroad Co.*, 166 U. S. 399; *McKenna v. Fiske*, 1 How. 240; *McDonnell v. Oceanic Nav. Co.*, 143 Fed. Rep. 480; *The Noranmore*, 113 Fed. Rep. 367; *The Osceola*, 189 U. S. 158; *Phila. &c. R. R. v. Phila. &c. Co.*, 23 How. 209; *The Plymouth*, 3 Wall. 20; *The Pickands*, 42 Fed. Rep. 239; *The Picqua*, 97 Fed. Rep. 649; *Queen v. Judge*, 1 Q. B. (1892) 273; *The Queen*, 40 Fed. Rep. 694; *Regina v. Keyn*, 2 Ex. D. 63; *Railroad Co. v. Baugh*, 149 U. S. 368, 386; *Skinner's Case*, 6 State Trials, 712; *Stevens v. Sandwich*, 1 Pet. Ad. Dec. 233; *The Strabo*, 90 Fed. Rep. 110; *Tilly v. Rockingham*, 74 N. H. 316; *Westinghouse v. Callaghan*, 155 Fed. Rep. 397.

Mr. W. H. Price, Jr., and *Mr. John E. Semmes, Jr.*, with whom *Mr. John E. Semmes*, *Mr. Jesse N. Bowen* and *Mr. Matthew Gault* were on the brief, for respondent:

Admiralty has jurisdiction in the cases at bar, for the following reasons:

The admiralty courts having properly assumed jurisdiction when the libel was brought against both the ship and the stevedore company, should retain jurisdiction to determine the liability of the stevedore company, even though the libel be subsequently dismissed as to the ship.

Jurisdiction once assumed by the Federal court because jurisdictional amount is alleged in good faith to be involved, is not lost because it subsequently develops by the evidence that less than the jurisdictional amount is actually involved.

Where the requisite diversity of citizenship exists at the commencement of a suit, no subsequent change in the

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Argument for Respondent.

situation of the parties ousts the jurisdiction of the Federal court.

Where Federal and non-Federal questions are involved in the same suit, and jurisdiction has properly attached for the purpose of determining the Federal question, it is proper for the Federal court to decide the local question only and omit to decide the Federal question. *Campbell v. Hackfeld*, 125 Fed. Rep. 696, can be distinguished.

The sole test of admiralty jurisdiction over torts is the locality of the person or thing injured at the time of the impact with the intentional or negligent force.

There is a distinction between admiralty jurisdiction of the United States and that of England.

Locality is the sole test.

The constitutional extent of admiralty jurisdiction is involved in this case.

The tort in this case was essentially maritime in its nature.

On the evidence the master failed in his duty to provide a safe place.

The gang boss was a vice-principal, as was also the foreman.

The evidence was sufficient as to the proximate cause of the accident and as to lack of safety of place of work.

In support of these contentions, see *Barry v. Edmonds*, 116 U. S. 550; *The Blackheath*, 95 U. S. 361; *Balt. & Ohio Ry. Co. v. Baugh*, 149 U. S. 368; *Clark v. Mathewson*, 12 Pet. 164; *Chappell v. United States*, 160 U. S. 499; *Campbell v. Hackfeld*, 125 Fed. Rep. 696; *Cleveland R. R. Co. v. Cleveland S. S. Co.*, 208 U. S. 316; *The Coningsby*, 202 Fed. Rep. 814; *Chicago Junction Ry. Co. v. King*, 222 U. S. 222; *C., R. I. & P. Ry. Co. v. Brown*, 229 U. S. 317; *The Conqueror*, 166 U. S. 110; *The Carib Prince*, 170 U. S. 655; *The Clan Graham*, 153 Fed. Rep. 977; *DeLovio v. Boit*, 2 Gallison, 398; *Ex parte Easton*, 95 U. S. 72; *The Genesee Chief*, 12 How. 443; *The Gilbert Knapp*, 37 Fed. Rep. 209;

The George T. Kemp, Fed. Cas. No. 5341; *Gaynor v. Klander-Weldon Co.*, 174 Fed. Rep. 477; *Grand Trunk R. R. v. Ives*, 144 U. S. 408; *Insurance Co. v. Dunham*, 11 Wall. 1; *The Iriquois*, 194 U. S. 240; *The Lottawanna*, 21 Wall. 558; *Leathers v. Blessing*, 105 U. S. 626; *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *Mollan v. Torrance*, 9 Wheat. 537; *Moorewood v. Enequist*, 23 Fow. 493; *Martin v. West*, 222 U. S. 191; *Miller's Case*, Fed. Cas. No. 300; *Manchester v. Massa*, 139 U. S. 240; *The Mattie May*, 47 Fed. Rep. 69; *Mullan v. P. & S. Mail S. S. Co.*, 78 Pa. St. 25; *N. J. Steam Nav. Co. v. Merchants Bank*, 6 How. 344; *Omaha Horse R. R. Co. v. Cable Tramway*, 32 Fed. Rep. 727; *O'Brien v. Buffalo Furnace Co.*, 183 N. Y. 317; *The Plymouth*, 3 Wall. 36; *Peters v. George*, 154 Fed. Rep. 634; *Railroad Co. v. Mississippi*, 102 U. S. 135; *Smith v. Greenhow*, 109 U. S. 669; *Schunk v. Moline M. & S. Co.*, 147 U. S. 500; *Smithers v. Smith*, 204 U. S. 632; *Siler v. L. & N. R. R. Co.*, 213 U. S. 175; *Simmons v. S. S. Jefferson*, 215 U. S. 130; *The Segurranca*, 58 Fed. Rep. 908; *The Senator*, 21 Fed. Rep. 191; *Tennessee v. Davis*, 100 U. S. 257; *Thomas v. Lane*, 2 Sumner, 1; *The Troy*, 208 U. S. 321; *Tex. & Pac. R. R. Co. v. Howell*, 224 U. S. 577; *United States v. Bailsford*, 5 Wheat. 184; *United States v. Wiltberger*, 5 Wheat. 76; *United States v. Grush*, 5 Mason, 290; *United States v. Wilson*, 28 Fed. Cases, No. 718; *United States v. Berans*, 3 Wheat. 336; *United States v. Rodgers*, 150 U. S. 255; *Warring v. Clark*, 5 How. 441, 464; *Williamson v. United States*, 207 U. S. 425.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a libel to recover for personal injuries sustained by the libelant as a stevedore in the employ of the Atlantic Transport Company (the petitioner) which was engaged in loading the Pretoria, belonging to the Hamburg-American Steam Packet Company, while lying in the port

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of Baltimore. The libel was brought against both the owner of the ship and the stevedore company. It was dismissed as to the former, but a recovery against the latter was allowed by the District Court (190 Fed. Rep. 229) and sustained by the Circuit Court of Appeals (193 Fed. Rep. 1019). This writ of certiorari was granted.

The libelant was one of a gang engaged in loading and stowing copper. He was working on the ship, under one of the hatches. The covers of the hatch were in three sections, the division being made by two movable iron beams placed athwart the ship. The coverings of the middle section had been removed and placed on top of the fore and after sections. On the dock, the copper was piled upon a rope mat which was lifted by a winch, swung over the hatch, and lowered into the hold. On one of its return trips the mat caught under the after crossbeam which was instantly jerked out of its support and, with the lengthwise timbers resting on it and the hatch covers, fell into the hold severely injuring the libelant. The District Court (referring to the petitioner, the Atlantic Transport Company, as the stevedore) said, p. 231: "There would have been no accident had the entire hatch been uncovered. To uncover a hatch takes time and labor. If bad weather comes, it must be covered. Unnecessary uncovering is to be avoided. It is easy to make a partially covered hatch absolutely safe. The crossbeams of the hatch have holes in their ends. There are corresponding holes in the hatch combings. Pins can be put through these holes. It takes about five minutes to put them in. When in place, an accident such as gave rise to this case cannot happen. The ship's carpenter of the Pretoria keeps the pins when not in use. Accidents often happen because an opened hatch has been left unguarded, or because the hatch coverings fall into the hold. When they do, there is usually a dispute as to whether the ship or the stevedore is to blame. In the case at bar the ship and the stevedore were repre-

sented by the same proctors and by the same advocates. The stevedore acquits the ship . . . The stevedore proved that, when the ship came into port, it took complete charge of the hatches. It uncovered so much of them as it saw fit. If the pins were in and it wanted them out, it took them out. It laid them on the deck. The ship's carpenter gathered them up. If the pins were out and it wanted them in, it told the ship's carpenter. He put them in." For its failure to use due diligence in seeing that the libelant had a safe place in which to work the District Court held the Transport Company liable.

The principal question is whether the District Court had jurisdiction; that is, whether the cause was one 'of admiralty and maritime jurisdiction.' Const. Art. III, § 2; Rev. Stat., § 563; Judicial Code, § 24; Act of Sept. 24, 1789, c. XX, § 9, 1 Stat. 73, 76. As the injury occurred on board a ship while it was lying in navigable waters, there is no doubt that the requirement as to locality was fully met. The petitioner insists, however, that locality is not the sole test, and that it must appear that the tort was otherwise of a maritime nature. And this was the view taken by the Circuit Court of Appeals for the Ninth Circuit, in affirming a decree dismissing a libel for want of jurisdiction in a similar case. *Campbell v. Hackfeld & Co.*, 125 Fed. Rep. 696.

At an early period the court of admiralty in England exercised jurisdiction 'over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas.' *De Lovio v. Boit*, 2 Gall. 398, 406, 464, 474. While its authority was denied when the injurious action took place *infra corpus comitatus*, it was not disputed that jurisdiction existed when the wrong was done 'upon the sea, or any part thereof which is not within any county.' (4 Inst. 134.) The jurisdiction in admiralty of the courts of the United States is not controlled by the restrictive statutes and judicial prohibitions

of England (*Waring v. Clarke*, 5 How. 441, 457, 458; *Insurance Company v. Dunham*, 11 Wall. 1, 24; *The Lottawanna*, 21 Wall. 558, 576); and the limitation with respect to torts committed within the body of any county is not applicable here. *Waring v. Clarke*, *supra*; *The Magnolia*, 20 How. 296. "In regard to torts"—said Mr. Justice Story in *Thomas v. Lane*, 2 Sumn. 1, 9—"I have always understood, that the jurisdiction of the Admiralty is exclusively dependent upon the locality of the act. The Admiralty has not, and never (I believe) deliberately claimed to have any jurisdiction over torts, except such as are maritime torts, that is, such as are committed on the high seas, or on waters within the ebb and flow of the tide." This rule—that locality furnishes the test—has been frequently reiterated, with the substitution (under the doctrine of *The Genesee Chief*, 12 How. 443), of navigable waters for tide waters. Thus, in the case of *The Philadelphia, Wilmington & Baltimore R. R. Co. v. The Philadelphia & Havre de Grace Steam Towboat Co.*, 23 How. 209, 215, the court said: "The jurisdiction of courts of admiralty, in matters of contract, depends upon the nature and character of the contract; but in torts, it depends entirely on locality." Again, in the case of *The Plymouth*, 3 Wall. 20, where jurisdiction was denied upon the ground that the substance and consummation of the wrong took place on land and not on navigable water, the court said, p. 35: "The jurisdiction of the admiralty over maritime torts does not depend upon the wrong having been committed on board the vessel, but upon its having been committed upon the high seas or other navigable waters.—A trespass on board of a vessel, or by the vessel itself, above tide-water, when that was the limit of jurisdiction, was not of admiralty cognizance. The reason was, that it was not committed within the locality that gave the jurisdiction. The vessel itself was unimportant. . . . The jurisdiction of the admiralty does not depend upon the

fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance.” See *Manro v. Almeida*, 10 Wheat. 473; *Waring v. Clarke*, *supra*, p. 459; *The Lexington*, 6 How. 344, 394; *The Commerce*, 1 Black, 574, 579; *The Rock Island Bridge*, 6 Wall. 213, 215; *The Belfast*, 7 Wall. 624, 637; *Ex parte Easton*, 95 U. S. 68, 72; *Leathers v. Blessing*, 105 U. S. 626, 630; *Panama Railroad v. Napier Shipping Co.*, 166 U. S. 280, 285; *The Blackheath*, 195 U. S. 361, 365, 367; *Cleveland Terminal & Valley R. R. Co. v. Cleveland Steamship Co.*, 208 U. S. 316, 319; *Martin v. West*, 222 U. S. 191; *The Neil Cochran*, Fed. Cas. No. 10,087; *The Ottawa*, Fed. Cas. No. 10,616; *Holmes v. O. & C. Rwy. Co.*, 5 Fed. Rep. 75, 77; *The Arkansas*, 17 Fed. Rep. 383, 384; *The F. & P. M.* No. 2, 33 Fed. Rep. 511, 513; *The H. S. Pickands*, 42 Fed. Rep. 239, 240; *Hermann v. Port Blakely Mill Co.*, 69 Fed. Rep. 646, 647; *The Strabo*, 90 Fed. Rep. 110; 2 Story on the Constitution, § 1666. It is also apparent that Congress in providing for the punishment of crimes committed upon navigable waters has regarded the locality of the offense as the basis for the exercise of its authority. Act of April 30, 1790, c. IX, § 8, 1 Stat. 112, 113; act of March 3, 1825, c. LXV, 4 Stat. 115; Rev. Stat., §§ 5339, 5345, 5346; Criminal Code, § 272, 35 Stat. 1088, 1142; *United States v. Bevans*, 3 Wheat. 336, 387; *United States v. Willberger*, 5 Wheat. 76; *United States v. Rodgers*, 150 U. S. 249, 260, 261, 285; *Wynne v. United States*, 217 U. S. 234, 240.

But the petitioners urge that the general statements which we have cited, with respect to the exclusiveness of the test of locality in cases of tort, are not controlling; and that in every adjudicated case in this country in which the jurisdiction of admiralty with respect to torts has been sustained, the tort apart from the mere place of its occur-

rence has been of a maritime character. It is asked whether admiralty would entertain a suit for libel or slander circulated on board a ship by one passenger against another. See Benedict, Admiralty, 4th ed., § 231. The appropriate basis, it is said, of all admiralty jurisdiction, whether in contract or in tort, is the maritime nature of the transaction or event; it is suggested that the wider authority exercised in very early times in England may be due to its antedating the recognition by the common-law courts of transitory causes of action and thus arose by virtue of necessity.

We do not find it necessary to enter upon this broad inquiry. As this court has observed, the precise scope of admiralty jurisdiction is not a matter of 'obvious principle or of very accurate history,' *The Blackheath*, *supra*. And we are not now concerned with the extreme cases which are hypothetically presented. Even if it be assumed that the requirement as to locality in tort cases, while indispensable, is not necessarily exclusive, still in the present case the wrong which was the subject of the suit was, we think, of a maritime nature and hence the District Court, from any point of view, had jurisdiction. The petitioner contends that a maritime tort is one arising out of an injury to a ship caused by the negligence of a ship or a person or out of an injury to a person by the negligence of a ship; that there must either be an injury to a ship or an injury by the negligence of the ship, including therein the negligence of her owners or mariners; and that, as there was no negligence of the ship in the present case, the tort was not maritime. This view we deem to be altogether too narrow.

The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the

safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' See *The George T. Kemp*, 2 Lowell, 477, 482; *The Circassian*, 1 Ben. 209; *The Windermere*, 2 Fed. Rep. 722; *The Canada*, 7 Fed. Rep. 119; *The Hattie M. Bain*, 20 Fed. Rep. 389; *The Gilbert Knapp*, 37 Fed. Rep. 209; *The Main*, 51 Fed. Rep. 954; *Norwegian Steamship Co. v. Washington*, 57 Fed. Rep. 224; *The Seguranca*, 58 Fed. Rep. 908; *The Allerton*, 93 Fed. Rep. 219; Hughes, Adm. 113; Benedict, Adm., 4th ed., § 207. The libellant was injured because the care required by the law was not taken to protect him while he was doing this work. We take it to be clear that the District Court sitting in admiralty was entitled to declare the applicable law in such a case, as it was within the power of Congress to modify that law. *Waring v. Clarke*, *supra*; *The Lottawanna*, *supra*. The fact that the ship was not found to be liable for the neglect is not controlling. If more is required than the locality of the wrong in order to give the court jurisdiction, the relation of the wrong to maritime service, to navigation and to commerce on navigable waters, was quite sufficient. Even with respect to contracts where subject-matter is the exclusive test, it has been said that the true criterion is "whether it was a maritime contract, having reference to maritime service or maritime transactions." *Insurance Company v. Dunham*, 11 Wall. 1, 26. The Constitution provides that the judicial power shall extend 'to all cases of admiralty and maritime jurisdiction,' and the act of Congress defines the jurisdiction of the District Court, with respect to civil causes, in terms of like scope. To hold that a case of a tort committed on board a ship

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in navigable waters, by one who has undertaken a maritime service, against one engaged in the performance of that service, is not embraced within the constitutional grant and the jurisdictional act, would be to establish a limitation wholly without warrant.

The remaining question relates to the finding of negligence. It is urged that the neglect was that of a fellow-servant and hence that the petitioner was not liable. Both courts below, however, concurred in the finding that the petitioner omitted to use proper diligence to provide a safe place of work. *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 386. As the question belongs to a class which under the distribution of judicial power is determinable by the Circuit Court of Appeals in last resort, we shall not undertake to discuss it at length or to restate the evidence. *Chicago Junction Rwy. Co. v. King*, 222 U. S. 222, 224; *Chicago, R. I. & Pac. Rwy. Co. v. Brown*, 229 U. S. 317, 320; *Grand Trunk Rwy. Co. v. Lindsay*, 233 U. S. 42, 50. It is sufficient to say that we are satisfied from an examination of the record that the ruling was justified.

Affirmed.

ATLANTIC TRANSPORT COMPANY OF WEST
VIRGINIA *v.* STATE OF MARYLAND TO THE
USE OF SZCZESEK.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
FOURTH CIRCUIT.

No. 216. Argued January 29, 30, 1914.—Decided May 25, 1914.

Decided on the authority of *Atlantic Transport Company v. Imbrovek*,
ante, p. 54.

193 Fed. Rep. 1019, affirmed.

THE facts are stated in the opinion.

Syllabus.

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Mr. Edward Duffy, with whom *Mr. Nicholas P. Bond* and *Mr. Ralph Robinson* were on the brief, for petitioner.

Mr. W. H. Price, Jr., and *Mr. John E. Semmes, Jr.*, with whom *Mr. John E. Semmes*, *Mr. Jesse N. Bowen* and *Mr. Matthew Gault* were on the brief, for respondent.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a libel filed on behalf of the widow and infant children of Martin Szczesek to recover damages for injuries resulting in his death. Szczesek was a stevedore in the employ of the Atlantic Transport Company, the petitioner, and was engaged in loading the ship Pretoria. The District Court allowed a recovery against the petitioner (190 Fed. Rep. 240) which the Circuit Court of Appeals affirmed. 193 Fed. Rep. 1019.

The questions presented are the same as those which were considered in *Atlantic Transport Company v. Imbrovek*, ante, p. 52, decided this day and, for the reasons stated in the opinion in that case, the decree is affirmed.

Affirmed.
